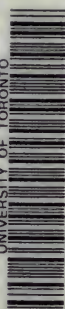


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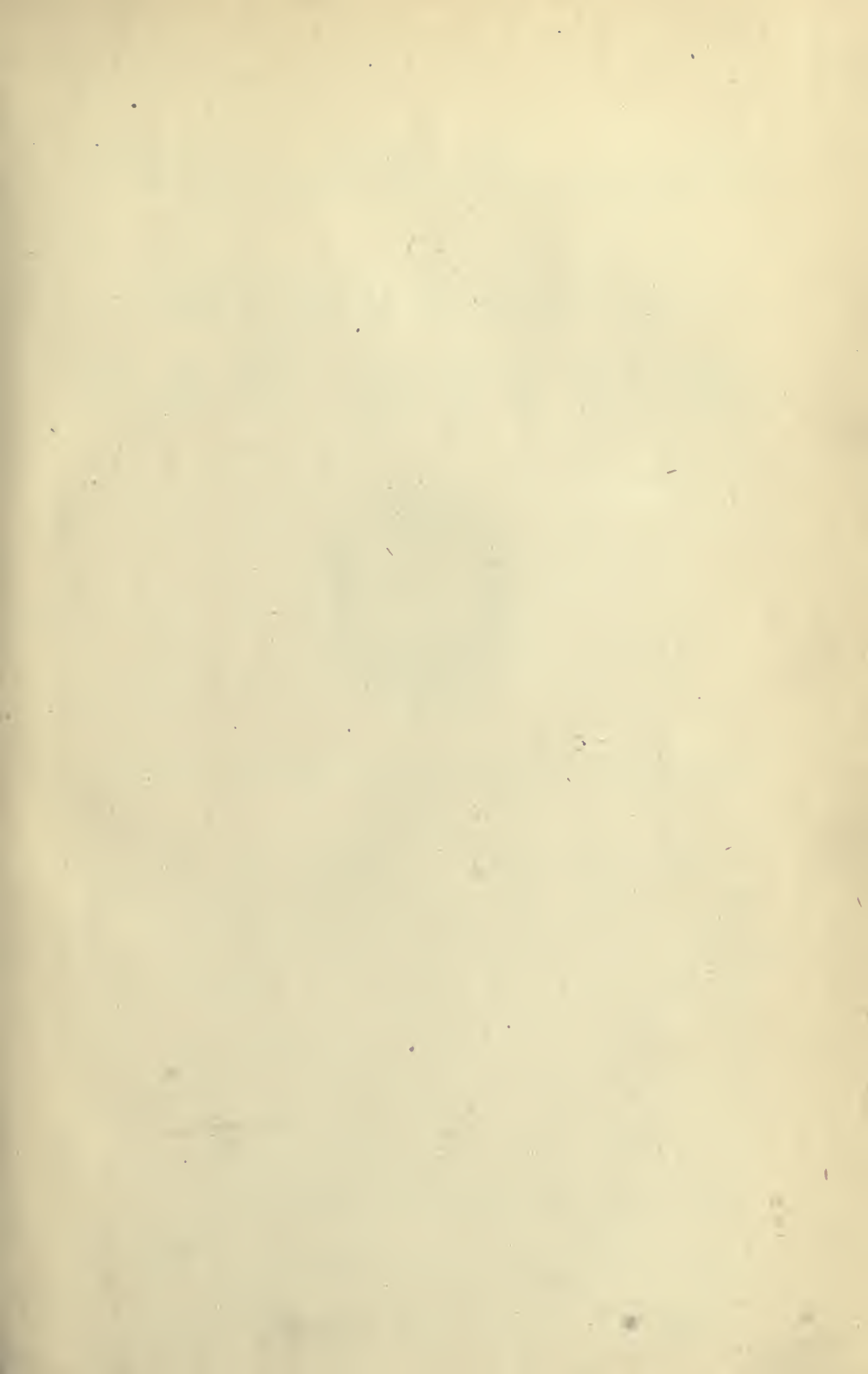
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# MINNESOTA LAW REVIEW

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VOL. XIII

JANUARY, 1919

No. 2

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## THE JUDICIAL SYSTEM OF ONTARIO

WHEN, in 1791, the Province of Upper Canada began its separate existence, it consisted in fact of considerably more territory than the present Province of Ontario. The Royal Proclamation of October, 1763,<sup>1</sup> had created a "Government" of Quebec, the western boundary of which was a line drawn from the southern end of Lake Nipissing to the point at which the present international boundary crosses the St. Lawrence. But the Quebec Act of 1774<sup>2</sup> much enlarged the Province of Quebec; the southern boundary was extended along the St. Lawrence, Lake Ontario, the Niagara River, the south shore of Lake Erie to the western limit of Pennsylvania, then south along the western limit to the Ohio River and down the Ohio to its junction with the Mississippi, then "northward" to the Hudson's Bay Company's Territory. (The word "northward" was long afterwards authoritatively interpreted as meaning "up the Mississippi.")<sup>3</sup>

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<sup>1</sup> This Proclamation may be read in Shortt & Doughty's Constitutional Documents 1759-1792, published by the Dominion Archives or in the Report for 1906 of the Ontario Archives.

<sup>2</sup> 14 George III Chap. 83 (Imp.).

<sup>3</sup> The Dominion of Canada made as the eastern boundary of the new Province of Manitoba the western boundary of the Province of Ontario (formerly Upper Canada), and claimed with Manitoba that "Northward" meant due "North" so that the boundary line would intersect Lake Superior. Ontario claimed that "Northward" meant up the Mississippi to its headwaters. An arbitration decided that Ontario's contention was sound and this was approved by the Judicial Committee of the Privy Council. We must therefore consider the western boundary of the Province of Quebec as fixed by the Quebec Act as running up the Mississippi to the northwest angle of the Lake of the Woods and thence due north.



When Quebec was divided into two Provinces, Upper Canada and Lower Canada, all to the east and the west of a certain line<sup>4</sup> and the Ottawa River became the Provinces of Lower Canada and Upper Canada respectively. Before this, however, the Treaty of 1783 had given to the United States the territory to the right of the Great Lakes and connecting rivers. But Britain held the military posts Michillimackinac, Detroit, Niagara, Oswego, Oswegatchie, etc., until August, 1796, when they were given up under Jay's Treaty of 1794, thereby reducing the de facto Upper Canada to the Upper Canada de jure, now the Province of Ontario.<sup>5</sup>

The English Law, civil and criminal, had been introduced into Quebec by the Proclamation of 1763; but the Quebec Act of 1774 had displaced the English civil law by the previously existing Canadian law, in substance the Coutume de Paris, while the English criminal law remained in full force.<sup>6</sup>

The Canada Act or Constitutional Act of 1791<sup>7</sup> provided for a Parliament of two Houses for each of the new Provinces with full power to determine and enact such laws as should be thought advisable for the Province.

At the time of the passing of this Act the territorial unit for the administration of justice was the District.<sup>8</sup> In 1763 the whole "Government of Quebec" was divided into two Districts;<sup>9</sup> in 1788 the territory afterwards Upper Canada, theretofore part of the District of Montreal,<sup>10</sup> was divided into four Districts,<sup>11</sup>

<sup>4</sup> Still the boundary line between the Provinces of Ontario and Quebec.

<sup>5</sup> These posts were retained by Britain until the agreement in the Treaty of 1783 was implemented that British creditors should not be prevented from recovering the debts lawfully due them by citizens of the new nation. By Jay's Treaty of 1794, the United States agreed to pay these debts, and the posts were delivered up in August, 1796.

<sup>6</sup> Except as modified by statute, the English criminal law as it stood in 1763 is still in force throughout Canada.

<sup>7</sup> 31 George III, Chap. 31 (Imp.). It was during the debate on this statute in the House of Commons at Westminster that the historical quarrel between Burke and Fox took place.

<sup>8</sup> There were during the latter part of the French regime three divisions or districts for judicial purposes in Canada; viz., those of Quebec, Trois Rivières, and Montreal. The first British Governor formed only two, as there were not enough English speaking persons at Trois Rivières who could be made Justices of the Peace.

<sup>9</sup> Those at Quebec and Montreal.

<sup>10</sup> The District of Montreal stretched from the River St. Charles westward as far as the Province reached.

<sup>11</sup> Lunenburg, Mecklenberg, Nassau and Hesse, being the territory round Cornwall, Kingston, Niagara, and Detroit respectively; the names of these were changed by the first Parliament of Upper Canada (1792) into Eastern, Midland, Home (Niagara being then the capital of the Province), and Western.



and another District (Gaspé) was formed of the eastern part of the District of Quebec; while afterwards a District of Three Rivers was formed between those of Montreal and Quebec.

In each District there was a Court of Common Pleas of unlimited civil but no criminal jurisdiction<sup>12</sup> and a Prerogative Court for probate of wills, etc. There was also a Court of General (or Quarter) Sessions of the Peace, composed of all the Justices of the Peace in and for the District, which sat quarterly and tried criminal cases with a jury<sup>13</sup> and which had certain administrative jurisdiction; these did not try capital cases.

The French Canadian never tired of wondering that the English preferred an adjudication of their rights by tailors and shoemakers rather than by their judges, and consequently most of the civil cases were tried by judges without the intervention of a jury; but some concession was made by Ordinances of Quebec to the love of the English speaking for the jury system.

There was also a Court of King's Bench for the Province which had full criminal jurisdiction, but only appellate jurisdiction in civil matters. This was presided over by the Chief Justice of the Province who had no seat in the Courts of Common Pleas. There were also Courts of Oyer and Terminer and General Gaol Delivery in each District once a year or oftener to try criminal cases including capital cases;<sup>14</sup> these were all jury courts.

The first Parliament of Upper Canada met in the summer of 1792 at Newark (now Niagara-on-the-Lake) and by the very first chapter of its first statute it made the English law the rule of decision in all cases of property and civil rights,<sup>15</sup> and since that time in this Province the law has been and is the English law,

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<sup>12</sup> The Judges of the Courts of Common Pleas, three in each Court (except that of Hesse), were all laymen, except the Judge of the Hesse Court who lived at Detroit. He was the only Judge of that Court and was the well-known William Dummer Powell, born in Boston, Massachusetts, who afterwards became Chief Justice of Upper Canada. These Judges were all justices of the peace, and in that capacity sat in the General Sessions of the Peace with extensive criminal jurisdiction; some of them also received commissions of Oyer and Terminer and General Gaol Delivery, from time to time, which empowered them to preside at the Criminal Assizes.

<sup>13</sup> Theoretically the General Sessions could try all felonies and misdemeanors, and in the Tudor and Stuart times many thousands of culprits were hanged on the order of such Courts; but by the time of which we are now speaking capital offences were left for the Assizes to try.

<sup>14</sup> There were the Courts generally called "Criminal Assizes" presided over by Judges who received a special commission for the purpose.

<sup>15</sup> (1792) 32 George III Chap. 1 (U. C.). The English rules of evidence were also introduced by the same Act.

civil and criminal, as it was in 1792 and as modified by local legislation. The second chapter<sup>16</sup> directed all issues of fact, also all assessments of damages, to be determined by a jury. As this would prove a serious burden to litigants in cases of small importance, Courts of Requests were provided<sup>17</sup> in every locality, presided over by two or more Justices of the Peace with jurisdiction up to forty shillings (\$8.00); the four Courts of Common Pleas were left standing until two years later.

In 1793 the Prerogative Courts were abolished and a Court of Probate erected, with Surrogate Courts in each District.<sup>18</sup>

But the whole system was revolutionized in 1794 when the Courts of Common Pleas were abolished and a Court of King's Bench erected with a Chief Justice and two puisne Justices and with full jurisdiction, civil and criminal, for the whole Province.<sup>19</sup> This sat at the Capital of the Province "in term," but Commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery issued to the Judges of this Court to hold trial Courts in each District,<sup>20</sup> generally twice a year.

By an Act of the same year<sup>21</sup> a Court of Record was established in each District called the District Court, with limited jurisdiction. This was presided over by a District Court judge. The Court of Quarter Sessions was not interfered with.

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<sup>16</sup> 32 George III Chap. 2 (U. C.).

<sup>17</sup> 32 George III Chap. 6 (U. C.). The shilling in Canada until the sixth decade of the last century was according to the Halifax, Quebec, Provincial, or Canadian Currency and was worth 20 cents. In some parts of the Upper Province the York shilling was recognized (equal to 12½ cents) but it almost invariably received the full name "York shilling," i.e., the shilling of New York currency.

<sup>18</sup> The Prerogative Courts were not much frequented by the English speaking Canadians, while in the French Canadian law there was no necessity for proving wills at all. But the Prerogative Courts sometimes appointed curators and guardians, etc. The Act establishing the Court of Probate and its Surrogate Courts was (1793) 33 George III Chap. 8 (U. C.).

<sup>19</sup> 34 George III Chap. 2 (U. C.).

<sup>20</sup> While the names of others continued to be contained in the Commission of Oyer and Terminer and General Gaol Delivery for the trial of criminal cases, the Judges of the Court of King's Bench were the real judges of these Courts. The English system of Commissions of Assize and Nisi Prius for the trial of civil cases was now introduced for the first time and the Judges of the Court of King's Bench sitting under these commissions took the place of the Judges of the Courts of Common Pleas who sat under the authority of permanent commissions.

<sup>21</sup> (1794) 34 George III Chap. 3 (U. C.). The jurisdiction was from 40 shillings (\$8.00) to £15 (\$60); the jurisdiction was increased by subsequent legislation.

The Court of King's Bench (with its subordinate Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery), the District Court, the Court of Requests, the Court of Probate (with its Surrogate Courts) and the Court of Quarter Sessions may be considered the original of our present judicial system.

While it was considered that the delivery to the Lieutenant Governor of the Great Seal of the Province ipso facto made him keeper of the Seal for the Province with the powers of the Lord Chancellor therein, and while it is certain that a Court of Chancery had been held occasionally by the Governor of Quebec, the Lieutenant Governor of Upper Canada never held a Court of Chancery.<sup>22</sup>

In 1837 a Court of Chancery was erected, with the Lieutenant Governor as Chancellor, and one Vice Chancellor.<sup>23</sup> This Court was reorganized in 1849,<sup>24</sup> with a Chancellor and two Vice Chancellors, and so continued until its merger in 1881.

The business of the Court of King's Bench had increased so much that in 1837<sup>25</sup> provision was made for two more judges. This was, however, a temporary measure, and in 1849 a new Common Law Court was erected, the Court of Common Pleas,<sup>26</sup> with precisely the same jurisdiction and powers as the Court of Queen's Bench.<sup>27</sup> These two Courts of King's Bench and Common Pleas each had a Chief Justice and two puisne justices, and so continued until their merger in 1881.

---

<sup>22</sup> Several cases of the Governor sitting as a Court of Chancery at Quebec are of record in the Canadian archives. Chief Justice Powell tried to get the Lieutenant Governor of Upper Canada to act as a Chancellor in an action brought against him (Powell) by Sir James Monk, Chief Justice in Lower Canada, but without success.

<sup>23</sup> 7 William IV Chap. 2 (U.C.). The Lieutenant Governor did not in fact officiate as Chancellor: the Vice-Chancellor was Robert Sympson Jameson, the husband of the well-known authoress, Mrs. Anna Jameson.

<sup>24</sup> 12 Vic. Chap. 64 (Can.).

<sup>25</sup> By the Act (1837) 1 Will. IV Chap. 1 (U.C.).

<sup>26</sup> 12 Vic. Chap. 63 (Can.).

<sup>27</sup> The Court of Queen's Bench had a sentimental precedence—for a time the Chief of that Court was Chief Justice of the Province; and so long as there was any division of the High Court of Justice into Divisional Courts, the list of judges began with those of the Queen's Bench Division, the successor of the former Court of King's Bench (I was the last to be appointed to the King's Bench Division—in 1906), then followed the names of those of the Chancery Division, the successor of the Court of Chancery (founded in 1837), and those of the Common Pleas Division, the successor of the Court of Common Pleas (founded in 1849). Later a fourth Division was formed, i.e., the Exchequer Division; but this did not represent any previously existing Court.



Before considering the fusion of the Courts in 1881, we must say something of the Courts of Appeal.

Before the Act of 1794, creating the Court of King's Bench (see n. 19), appeals were taken from the Courts of Common Pleas to the old Court of King's Bench (none ever existed in the Province of Upper Canada); by that Act, the Lieutenant Governor or Chief Justice and two or more members of the Executive Council were made a Court of Appeal in matters over £100, a further appeal being allowed to the Privy Council at Westminster where more than £500 sterling was involved. This same Court of Appeal was given jurisdiction in appeals from the Court of Chancery in 1837; but the Court was abolished in 1849, and a new Court of Error and Appeal constituted to hear appeals from the two Common Law Courts and the Court of Chancery. It was composed of all the Judges of the then Courts of first instance,<sup>28</sup> and this Court was in 1874 re-constituted and thereafter consisted of five Judges, permanently of the Court of Appeal, and so continued until the merger of 1881.

The District Courts dating back to 1794, one in each District, with purely civil jurisdiction, became County Courts in 1849;<sup>29</sup> these were presided over by barristers.

The Courts of Requests originally erected in 1792 were at first presided over by Justices of the Peace *virtute officii*, but in 1833<sup>30</sup> it was provided that Commissioners to be appointed by the Governor should hold these courts and in 1841<sup>31</sup> it was enacted that Courts to be called Division Courts presided over by the Judge of the District Court should take the place of these Courts of Requests, thus putting an end to non-professional judges in these the lowest courts.<sup>32</sup>

The Court of Probate, with its Surrogate Courts created by the Act of 1793 (see n. 18), was abolished in 1858<sup>33</sup> and a Surro-

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<sup>28</sup> (1849) 12 Vic. Chap. 65 (Can.). It will be seen that this Court had a strong resemblance to the English Court of Exchequer Chamber.

<sup>29</sup> (1849) 12 Vic. Chap. 78 (Can.). The Districts had become so multiplied that their boundaries in many cases became identical with the boundaries of the Counties, and it was not thought worth while to retain the District.

<sup>30</sup> 3 William IV Chap. 1 (U. C.).

<sup>31</sup> 4 & 5 Vic. Chap. 3 (Can.).

<sup>32</sup> In Ontario every civil suit is tried before a Judge who must have been a member of our Bar for at least seven years (ten years in the case of a Judge of the Supreme Court). An exception lies in certain disputes between master and servant, which may be tried by Magistrates.

<sup>33</sup> 22 Vic. Chap. 93 (Can.). This Act formally repealed 33 George III Chap. 8 (U. C.).

gate Court for each County, presided over by a judge with same powers as a Judge of a County Court, was provided for.<sup>34</sup> The County Courts, Division Courts, Surrogate Courts, and Courts of General Sessions (these are now presided over by a Judge of the County Court) still continue.

But in 1881 the Courts of Appeal, Queens Bench,<sup>35</sup> Chancery, and Common Pleas were united and consolidated into one Supreme Court of Judicature for Ontario<sup>36</sup> composed of two permanent divisions: (1) the Court of Appeal for Ontario and (2) the High Court of Justice for Ontario; of this High Court there were at first three Divisions, i.e., Queen's Bench, Chancery, and Common Pleas Divisions—later a fourth, the Exchequer Division, was added. Each Division had a Chief Justice (the Chancery Division a Chancellor) and two puisne Justices. The Court of Appeal had a Chief Justice (the Chief Justice of Ontario) and four puisne Justices. These four Divisional Courts of the High Court Division sat alternately in term to hear appeals. This was found inconvenient; and an act was passed in 1909, brought into force January 1, 1913, which erected a Supreme Court with two Divisions, (1) the Appellate Division for appeals only, and (2) the High Court Division for trials.

The Appellate Division at present consists of two Divisional Courts, each of five members with co-ordinate and co-equal authority and jurisdiction, each bound by the decision of the other. The First Divisional Court consists of the Chief Justice of Ontario and four Justices appointed to the Appellate Division; it is the successor of the Court of Appeal for Ontario and its members cannot without their consent be required to try cases. The Second Divisional Court is made up of five Justices of the High Court Division who have been elected by the Justices of that Division in December of each year to constitute the Second Divisional Court for the coming year—the personnel of this Court changes

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<sup>34</sup> The Judges of the Surrogate Court are appointed by the Province, those of all other Courts by the Dominion. Almost invariably, at least in later years, a Judge of the County Court has been appointed Judge of the Surrogate Court.

<sup>35</sup> The Court of King's Bench became, of course, the Court of Queen's Bench in 1837 on the accession to the throne of Queen Victoria, but the Statute formally changing the name was not passed till 1839, 2 Vic. Chap. 1 (U. C.).

<sup>36</sup> This was effected by the Ontario Judicature Act (1881), 44 Vic. Chap. 7 (Ont.).

from year to year.<sup>37</sup> The other members of the High Court Division are supposed to preside in trial Courts and as Judges of first instance.

But every Justice of the Supreme Court has the same powers as every other and any one may sit in any Court whether of appeal or of first instance.<sup>38</sup> From every Judgment at the trial before a Supreme Court Judge an appeal lies to the Appellate Division. The Divisional Courts generally sit on alternate weeks, but sometimes when work is pressing they sit concurrently, four being a quorum in a Divisional Court.<sup>39</sup>

An appeal also lies to the Appellate Division from the County<sup>40</sup>

<sup>37</sup> The reason for this rather odd method of forming Appellate Courts is of course historical. It would not have been devised had the matter been *tabula rasa*. The members of the First Divisional Court do frequently take trial Courts, and the Members of the High Court Division frequently sit in the First Divisional Court.

<sup>38</sup> The work to be done by the several Judges is a matter of arrangement amongst themselves and there never has been the slightest difficulty or want of harmony: appointments are made or exchanged at will to suit the convenience, health, or desire of the various Judges—no litigant or lawyer can ever be sure who will try his case or hear his appeal.

<sup>39</sup> Provision is made in the Act for an additional Divisional Court, if necessary.

<sup>40</sup> The jurisdiction of the County Court is given by the Revised Statutes of Ontario (1914) Chap. 59, sec. 22, as follows:

- "22. (1) The County and District Courts shall have jurisdiction in:
- (a) Actions arising out of contract, expressed or implied, where the sum claimed does not exceed \$800;
  - (b) Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed \$500;
  - (c) Actions for trespass or injury to land where the sum claimed does not exceed \$500, unless the title to the land is in question, and in that case also where the value of the land does not exceed \$500, and the sum claimed does not exceed that amount;
  - (d) Actions for the obstruction of or interference with a right of way or other easement where the sum claimed does not exceed \$500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;
  - (e) Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed \$500;
  - (f) Actions for the enforcement by foreclosure or sale or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed \$500. 10 Edw. VII, c. 30, s. 22 (1) part; 1 Geo. V, c. 17, s. 48;
  - (g) Partnership actions where the joint stock or capital of the partnership does not exceed in amount or value \$2,000;
  - (h) Actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount \$500, and the estate of the testator does not exceed in value \$2,000;
  - (i) All other actions for equitable relief where the subject matter involved does not exceed in value or amount \$500; and



and Surrogate Courts and from the Division<sup>41</sup> Courts in certain

- (j) Actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed \$500. 10 Edw. VII, c. 30, s. 22 (1) part."

<sup>41</sup> The jurisdiction of the Division Court is given by the Revised Statutes of Ontario (1914) Chap. 63, Secs. 61 and 62, as follows:

"61. The Court shall not have jurisdiction in

- (a) An action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;
- (b) An action in which the validity of any devise, bequest, or limitation under any will or settlement is disputed;
- (c) An action for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;
- (d) An action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto;
- (e) An action upon a judgment, or order of the Supreme Court or a County Court where execution may issue, upon or in respect thereof. 10 Edw. VII, c. 32, s. 61.

"62. (1) Save as otherwise provided by this Act, the Court shall have jurisdiction in:

- (a) A personal action where the amount claimed does not exceed \$60;
- (b) A personal action if all the parties consent thereto in writing, and the amount claimed does not exceed \$100;
- (c) An action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100; provided that in the case of an unsettled account the whole amount does not exceed \$600;
- (d) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed \$200, and the amount claimed is
  - (i) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—
  - (ii) The balance of an amount not exceeding \$200 which amount is so ascertained or—
  - (iii) The balance of an amount so ascertained which did not exceed \$400 and the plaintiff abandons the excess over \$200.

An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

The jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor.

- (e) An action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the creditor does not exceed \$60;
- (2) Claims combining
- (a) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$60, hereinafter referred to as class (a);
- (b) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$100, hereinafter referred to as class (b);
- (c) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$200, hereinafter referred to as class (c), may be joined in one action; provided that the whole amount claimed in

cases. In certain cases of importance an appeal lies to the Supreme Court of Canada or to the Privy Council.<sup>42</sup>

*The Practice (Civil).*—In the lowest Court, the Division Court, the forms are of the simplest character, and pleading in any proper sense there is not. In the Supreme Court and County Courts the keynote is to be found in one of the Consolidated Rules:

"A proceeding shall not be defeated by any formal objection; but all necessary amendments shall be made upon proper terms as to costs and otherwise to secure the advancement of justice, the determining the real matter in dispute and the giving of judgment according to the very right and justice of the case."

In the Supreme Court and the County Court all actions and suits are begun by writ of summons, indorsed with the cause of action. The defendant has ten days to appear by filing a formal appearance. If he does not, then judgment may be entered, final or interlocutory, as the case may be, according as the claim is such as permits a special endorsement (e.g., a promissory note, etc.) or not. If interlocutory, and a question of damages is involved, then the case goes to trial for assessment—in the case of other claims, e.g., upon a mortgage, other provisions are made. Upon appearance, unless the defendant waives the right to a statement of claim, the plaintiff files and serves a statement of the facts which he alleges and upon which he bases his right of action—this must be done within three months of appearance;

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respect of class (a) does not exceed \$60; and that the whole amount claimed in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), does not exceed \$100; and that the whole amount claimed in respect of classes (a) and (c), or (b) and (c) combined, does not exceed \$200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) does not exceed \$100.

(3) The findings of the court upon claims so joined shall be separate.

(4) The Court shall also have jurisdiction in actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed \$60, provided in The Replevin Act.

(5) The Court shall also have jurisdiction in actions between teachers and School Boards as provided by The High Schools Act, The Public Schools Act, and The Separate Schools Act. 10 Edw. VII, c. 32, s. 62."

<sup>42</sup> The Supreme Court of Canada sits at Ottawa and is the Appellate Court for all Canada; the cases are few in number, but often of great importance, in which an appeal is taken to that Court from the Appellate Division of The Supreme Court of Ontario.

The Judicial Committee of the Privy Council is composed of Privy Councillors from all over the British Empire (including Canada) and is the final Court of Appeal for all the British world except the Islands of Great Britain and Ireland, appeals from which go to the House of Lords. It is generally constitutional questions that go to that tribunal—not more than half a score a year from Ontario.

if not, the defendant may move to dismiss the action. If a statement of claim is served, the defendant has eight days to file and serve his defence. He may with his defence set up any claim he has against the plaintiff; the plaintiff replies if so advised. When the pleadings are closed, a notice of trial may be given at least ten days before the day of trial. The parties are entitled before the trial to have produced under oath by their opponent all documents and copies of documents bearing upon the causes of action; and also to examine under oath the opposite party before a Master or Special Examiner. Certain actions, such as libel, must be tried by a jury unless both parties waive the right to a jury; certain others, which are purely equitable, by a Judge, unless the Judge otherwise orders. In all other kinds of actions, if either party desires a jury he files and serves a jury notice, but the Judge at the trial may in his discretion try any such case without a jury, upon or without the application of either party.<sup>43</sup> The

<sup>43</sup> I have in an address on the Jury System of Ontario, prepared at the request of the Bar Association of the State of New York, January, 1914, given an outline of the evolution in our practice of the Jury system.

The first break in the jury system was made by the Law Reform Act of 1868, 32 Vic. Chap. 6 (Ont.), which directed actions to be tried by a Judge unless either party filed a notice for a jury—this provision was extended by the Administration of Justice Act of 1873, 36 Vic. Chap. 8 (Ont.). The Act of 1896, 59 Vic. Chap. 18 (Ont.), required actions against municipalities to be tried by a Judge without a jury.

As the law now stands, there are these classes of cases in the Supreme Court and County Court:

1. Those which must be tried by a jury unless the parties in person or by solicitors or counsel consent. These are cases of libel and slander.
2. Those which must be tried by a Judge: i.e., actions against a municipal corporation for non-repair.

3. Those which are tried by a Judge unless he otherwise orders:

- (a) Equitable issues,

- (b) See class 4.

4. In other cases, if either party desire a jury, he files and serves a jury notice within four days of the close of the pleadings. If the other party submit, the case goes on the jury list for trial. If the other party object, he may move in Chambers before a single Judge. For a long time there was a conflict of judicial opinion as to the principle to be followed in striking out a jury notice. Finally we made a rule making it obligatory upon the Judge in Chambers to strike out the jury notice "when . . . it appears to him that the action is one which ought to be tried without a jury." It is expressly provided, however, that the refusal of a Judge in Chambers to strike out the jury notice shall not interfere with the right of the Trial Judge to strike it out; nor does the order of the Judge in Chambers striking out a jury notice interfere with the right of the Trial Judge to have the case tried by a jury.

If a jury notice is not served, the case goes on the non-jury list and will be tried by a Judge without a jury unless the Judge himself prefers it to be tried with a jury.

At every Assize town for the jury sittings there are two lists prepared. one a jury list (which is placed first) and the other a non-jury list. It is



civil jury is twelve in number; ten may find a verdict. In many cases, indeed in most cases except those of the simplest character, the trial judge instead of taking a general verdict requires the jury to answer questions of fact submitted to them and upon these answers directs the judgment to be entered according to his own view of the law. The jury agreeing, the trial judge cannot grant a new trial; if the jury disagree, he may traverse the case or call another jury and proceed with the trial afresh. The party discontented with the result of a trial may appeal within thirty days to the Appellate Division. The Court may order a new trial or direct the judgment to be entered which should have been entered. Amendments may be made at any time as may be just. In a few cases an appeal lies to the Supreme Court of Canada, sitting at Ottawa, composed of six Judges—and in a limited number of cases the final appeal from the Court of Appeal or even (upon leave) from the Supreme Court of Canada to the King in Council in Westminster—"The Judicial Committee of the Privy Council." The party failing may be ordered to pay the costs of the successful party, including most of his solicitor and counsel fees.

*Costs.*—In the Supreme Court and County Courts on the civil side there is a fixed tariff of fees for the various services to be rendered by Solicitor and Barrister, also for witness fees, etc. The Judge before whom any action is tried has the right, and generally exercises it, to direct the losing party to pay the costs of the winning party. A Court also very generally directs the payment of costs by a party in default when extending time, making amendments, and the like. In very few cases on the criminal side

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a common practice for the Trial Judge at the beginning of the sitting to run over the records and strike out the jury notice in such cases as he thinks proper. It is not uncommon to place the records in such instances where they should have been in the first instance on the non-jury list; thereby the offender may be penalized, losing time waiting for his action to be tried.

In most of the Assize towns there are also non-jury sittings; at these no jury cases are entered, but if a case should appear which the Judge thinks should be tried with a jury, he may adjourn it to the jury sittings. (I have never known a case of this kind.)

At Toronto there are separate sittings for jury and non-jury cases, the non-jury sittings being practically continuous and the jury sittings six to ten weeks in the year. If a case comes before the Judge presiding at the jury sittings which he thinks should not be tried with a jury, he sends it across the hall to the Non-Jury Court. No doubt if the reverse were to happen the record might be transferred in the opposite direction; but, as I have said, I never knew a case of that kind.

is there any provision for costs. Where, however, a defendant applies to have the conviction of a Magistrate quashed for want of jurisdiction or want of evidence, or the like, he must put up security for the costs, and if he fails may be ordered to pay them.

Appeals are generally decided within three months of the trial—a trial should be had within six months of the issue of the writ.

*Criminal Procedure.*—At the conquest of Canada by the British, 1759-60, the English criminal law was introduced by the conquerors; though (with the exception of a few years) the French-Canadians were permitted to retain their own law in civil matters, the English criminal law continued to prevail in both Canadas except as modified by Provincial Statutes—and these Statutes in general closely follow the legislation in the mother country. This last statement also applies to the Provinces of Nova Scotia and New Brunswick. Accordingly, at Confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia, and New Brunswick, the Lower Canadian law being based upon the custom of Paris and ultimately upon the Civil Law of Rome, while that of the others was based upon the Common Law of England. Accordingly, the British America Act which created (1867) the Dominion of Canada gave to the Parliament of the Dominion jurisdiction over the criminal law including the procedure in criminal matters. The Provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the criminal law; and at length Sir John Thompson, who had been himself a Judge in Nova Scotia, and who became Prime Minister of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House, and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished; and offences which are the subject of indictment are "indictable offences." Offences not the subject of an indictment are called "offences" simply. Certain offences of a minor char-



acter are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a Magistrate's decision adverse to the accused to the County Court Judge both on law and fact; or the conviction may be brought up on certiorari to the High Court on matter of law.

But offences of a higher degree are indictable.

If a crime, say of theft, is charged against anyone, upon information before a Justice of the Peace, a summons or warrant is issued and the accused brought before the Justice of the Peace. In some cases he is arrested and brought before the Magistrate without summons or warrant; but then an information is drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government and are not, as a rule, lawyers.

Upon appearance before the Justice of the Peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument, or he may *proprio motu* hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" Then, if desired by the accused, the defence evidence is called.

If at the close of the evidence the Magistrate is of opinion that no case is made out, he discharges the prisoner, but the accused may demand that the accuser be bound over to prefer an indictment at the Court at which the accused would have been tried if the Magistrate had committed him.

If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

Police Magistrates are appointed for most cities and towns, who are generally Barristers; these have a rather higher jurisdiction than the ordinary Justice of the Peace—in some cases with the consent of the accused.

The Courts which proceed by indictment are the Supreme Court and the General or Quarter Sessions. Judges of these Courts are appointed by the Crown (i.e., the Administration at Ottawa) for life and must be Barristers of ten (or seven) years' standing.

The Supreme Court can try any indictable offence; the Sessions cannot try treason and treasonable offences, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial, and the case then disposed of.

If a jury trial be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of thirteen persons) by a Barrister appointed by the Provincial Government for that purpose. The Indictment may be in popular language without technical averment; it may describe the offence in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the statute which may be followed. Here is a sample:

"The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D., 1912."

No bill can be laid before the Grand Jury by the Crown Counsel (unless with the leave of the Court) for any offences except such as are disclosed in the depositions before the Magistrate. But sometimes the Court will allow other indictments to be laid.

The Grand Jury has no power to cause any indictment to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads "Not Guilty," the trial proceeds.

He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases; the Crown has four, but may cause any number to stand aside until all the jurors have been called.

I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a jurymen asked a question.

In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Appellate Division, or the Judge may do that *proprio motu*. The Appellate Division may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected, or something was done at the trial not according to law, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned at the trial. If the Court of Appeal is unanimous against the prisoner, there is no further appeal, but if the Court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge, and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the Judge.

No more than five experts are allowed on each side—four in civil cases.

I have never known a murder case (except one) take four days—most do not take two, even with medical experts.

WILLIAM RENWICK RIDDELL.\*

TORONTO.

\*Justice of the Supreme Court of Ontario.



# MINNESOTA LAW REVIEW



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## JUDGES IN THE PARLIAMENT OF UPPER CANADA.

WHEN Pitt in 1791 introduced in the House of Commons the Canada Act or Constitutional Act, which he afterwards declared to be the object of his greatest pride, and under which the division of the old Province of Quebec into two Provinces of Upper and Lower Canada was to be effective, with almost his first word<sup>1</sup> he declared that the Bill was intended to give Canadians "all the advantages of the British Constitution." Lord Grenville in the House of Lords used much the same language.<sup>2</sup> Burke, Fox, and some others were not convinced that the Act in reality carried out the expressed intention; but there can be no doubt of the general object of the Bill.<sup>3</sup>

The first Lieutenant Governor of Upper Canada (which with Lower Canada was organized under the Constitutional Act in 1792), John Graves Simcoe, in his Address to the Houses of Parliament of Upper Canada at their first meeting, September, 1792, spoke of the Act as establishing the British Constitution and its forms in the Province;<sup>4</sup> at the close of the Session his address stated that the Constitution of the Province was "the very image and transcript of Great Britain."<sup>5</sup>

In analogy to the British form, there were two Houses of Parliament in each Province, the Legislative Council and the Legislative Assembly.<sup>6</sup>

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<sup>1</sup> See "The Parliamentary History of England" published by Hansard and often quoted by his name. Volume 28, p. 1377. (I shall use the convenient form of citation, "28 Hans. 1377.") The Act was (1791) 31 Geo. III Chap. 31 (Imp.).

<sup>2</sup> 29 Hans. 656, 657.

<sup>3</sup> The debate in the House of Commons lasted five days; it was during this debate that the historic quarrel took place between Burke and Fox; it is difficult to make out the real cause of the rupture—probably there was much more than appears on the surface; if not, Burke acted most childishly. See 29 Hans. 103-113; 359-430.

<sup>4</sup> Sixth Report of the Bureau of Archives for the Province of Ontario, Toronto, 1911, pp. 2, 3; Seventh *ibid.*, 1911, pp. 1-3. (These very valuable reports will be cited "6 Ont. Arch. Rep. 2, 3," etc.)

<sup>5</sup> 6 Ont. Arch. Rep., 18; 7 *ibid.*, 1-3.

<sup>6</sup> Before this time there had been only one legislative body. In the Royal Proclamation of 1763 a promise was contained that an elective Assembly would be called when the time came; and the early Governors had instructions to call such an Assembly at the proper time. But this was not found practicable; the Quebec Act

The Legislative Council corresponded to the House of Lords, appointive, but without the hereditary feature.<sup>7</sup> The Legislative Assembly elected by the people corresponded to the House of Commons and not unfrequently claimed the name and privileges.

In England there never was any objection to Judges becoming members of the Upper House. In early times, e. g., in the reign of Edward I, and for long afterwards, the Judges were regularly summoned to Parliament and had their places assigned among the Lords. Their summons differed, indeed, from that to the "Lords Spiritual and Temporal" (the Prelates, the Earls, and Barons), but they were none the less members of the House. Whether they lost their right to a place in Parliament when in the reign of Richard II the Council was separated from Parliament, or at what later time, is uncertain; but certainly it was gone before the reign of Henry VIII. When they lost their seats in the House of Lords, they were not relieved from the duty of attending the House to give their opinion on matters of law if and when called upon; and at length in 1660, at the time of the Restoration, the House of Lords decided that writs should be issued "to the Judges whereby they may attend in the House as *Assistants*."<sup>8</sup>

This was conclusive of the functions, with respect to the House of Lords, of the Judges as such; but it did not prevent a Judge from being a Member of the House or "Peer of Parliament."

William Murray was in 1756 appointed Chief Justice of the King's Bench and contemporaneously created a Peer by the title

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of 1774, 14 Geo. III, Chap. 83, put a stop to the scheme and made the Council the legislating body. The members of the Council were appointed by the Crown either immediately or through the Governor—see my paper on "Pre-Assembly Legislatures in British Canada." Trans. Royal Society of Canada for 1918, Sec. II, pp. 109-134.

<sup>7</sup> There was in the Act, indeed, a provision for hereditary seats on the Legislative Council, but it was never brought into force; and so Canada escaped the curse of hereditary legislators.

<sup>8</sup> Journals of the House of Lords, Vol. XI, p. 52, June 4, 1660. This was, of course, the "Convention Parliament" which was ostensibly called merely to secure the return of the King; but it was found (or at least considered) necessary and expedient that it should undertake other labours, and its acts were afterwards recognized as lawful. The curious will find all the learning on the subject in Pyke's "Constitutional History of the House of Lords," London and New York, 1894, pp. 47, 48, 195, 196, 246, 247, 248. Anson points out in his "Law and Custom of the Constitution," 2nd ed., Vol. 1, pp. 179, 180, that the common idea that the "Peerage" and the "House of Lords" mean the same thing is an error; there are Peers who are not Lords of Parliament and Lords of Parliament who are not Peers.



of Baron Mansfield, and from that time the Chief Justices of the King's Bench have generally been made Peers.<sup>9</sup>

The first Chief Justice of the Common Bench to become a Peer was Sir Charles Pratt who was created Lord Camden in 1765; some of his successors have also been Peers of Parliament.<sup>10</sup>

The first Chief Baron of the Exchequer who was a Peer was Sir John Singleton Copley, who became Lord Lyndhurst when he was appointed Lord Chancellor in 1827, but did not become Chief Baron until 1831; only one of his successors became a Peer.<sup>11</sup>

<sup>9</sup> The first Chief Justice of the King's Bench to become a Peer was Sir Robert Raymond who became Baron Raymond in 1731. Sir Phillip Yorke became Lord Hardwicke on being appointed Lord Chancellor. Sir William Lee was never a Peer, nor was Sir Dudley Ryder. Mansfield was followed by Sir Lloyd Kenyon who became Lord Kenyon on his appointment as Chief Justice in 1788; Sir Edward Law, Lord Ellenborough on his being appointed Chief Justice in 1802; Sir Charles Abbott, Lord Tenterden, 1827, having become Chief Justice, 1818; Sir Thomas Denman, Lord Denman, 1834, having become Chief Justice in 1832; Sir John Campbell, Lord Campbell, 1850; Sir Alexander J. E. Cockburn, Chief Justice, 1859, never became a Peer; Sir John Duke Coleridge, Chief Justice and Lord Coleridge, 1880; Sir Charles Russell became a Life Peer, Lord Russell of Killowen, on being appointed Lord of Appeal in Ordinary, May, 1894, and became Chief Justice two months later. Sir Richard Webster became Lord Alverstone and Master of the Rolls in 1899, Chief Justice, 1900; Sir Rufus Isaacs, Chief Justice, 1913, Lord Reading, 1914.

Chief Justices Coke, Hale, and Holt are often styled Lord Coke, Lord Hale, Lord Holt, (especially by American writers—I have seen even "Lord Cockburn" in one American legal journal)—this was the custom of their day. Judges were at that time often styled "Reverend," "Very Reverend," "Most Reverend," etc., titles now reserved for the clergy. The address "My Lord," "Your Lordship," "Their Lordships" is still used in the English Courts and our own.

<sup>10</sup> Sir John Eardley Wilmot and Sir William de Grey followed; the latter became Lord Walsingham, 1780, after his resignation. Then came Sir Alexander Wedderburn, Chief Justice and Lord Loughborough, 1780; Sir James Eyre; Sir John Scott, Chief Justice and Lord Eldon, 1799; Sir Richard Pepper Arden, Chief Justice and Lord Alvanley, 1801; Sir James Mansfield; Sir Vicary Gibbs; Sir Robert Dallas; Sir Robert Gifford, Chief Justice and Lord Gifford, 1824; Sir William Draper Best, Chief Justice, 1824, Lord Wynford on his resignation in 1829; Sir Nicolas Conyngham Tindal; Sir Thomas Wilde, Chief Justice, 1846, Lord Truro, 1850; Sir John Jervis; Sir Alexander J. E. Cockburn; Sir William Erle; Sir William Bovill; Sir John Duke Coleridge, Chief Justice, 1873, Lord Coleridge, 1874.

<sup>11</sup> They were Sir James Scarlett, Chief Justice, 1834, Lord Abinger, 1835; Sir Frederick Pollock, Chief Baron, 1844; Sir Fitzroy Edward Kelly, Chief Baron, 1866.



The Masters of the Rolls were early in the House of Lords; Sir John Colepeper became Lord Colepeper in 1644, the year after his appointment to the Mastership, but he had no successors in the House for nearly a century and three quarters. Of late years it has rather been customary to raise the Master to the Peerage.<sup>12</sup> But a number of Masters never became Peers, even for life.<sup>13</sup>

There never has been an instance of a puisne Judge (or Baron) being raised to the Peerage, but there is a modern instance of a Peer of the Realm being appointed a puisne Judge.<sup>14</sup> There never was any objection in law to either proceeding, and occasionally the puisne either when made Chief or later was elevated to the Peerage.<sup>15</sup>

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<sup>12</sup> Sir Lloyd Kenyon, M. R., 1784, became Lord Kenyon when he was appointed Chief Justice of the King's Bench, 1788. Sir Richard Pepper Arden, M. R., 1788, became Lord Alvanley when appointed Chief Justice of the Common Bench, 1801; Lord Gifford became M. R., 1788, after his elevation to the Peerage the same year; Sir John Singleton Copley, M. R. in 1826, became Lord Lyndhurst in 1827, when made Lord Chancellor; Sir Charles Christopher Pepys, M. R., 1834, became Lord Chancellor and Lord Cottenham, 1834; Henry Bickersteth became Lord Langdale when appointed M. R. in 1836. Sir John Romilly, M. R., 1851, became Lord Romilly, 1866; Sir William Balliol Brett, M. R., 1883, became Lord Esher, 1885; Sir Nathaniel Lindley, M. R., 1897, became a Baron for life when made Lord of Appeal in 1899; Sir Richard Everard Webster, M. R., May 10th, 1899, was made a Peer, Lord Alverstone, a month afterwards and became Lord Chief Justice in four months thereafter. Sir Richard Henn Collins, M. R., 1901, became a Baron for life when made Lord of Appeal in 1907; Sir Herbert Hardy Cozens-Hardy, M. R., became a Baron in 1914.

<sup>13</sup> William Lenthall, 1643; Sir Harbottle Grimston, 1660; John Churchill, 1685; Sir John Trevor, 1685 and 1693; Sir Henry Powle, 1689; Sir Joseph Jekyll, 1717; John Verney, 1738; William Fortescue, 1741; Sir John Strange, 1750; Sir Thomas Clarke, 1754; Sir Thomas Sewell, 1764; Sir William Grant, 1801; Sir Thomas Plumer, 1818; Sir John Leach, V. C. E., 1827; Sir George Jessel, 1873 (perhaps the greatest of all the Masters of the Rolls); and Sir Archibald Levin Smith 1899.

<sup>14</sup> Bernard John Seymour Coleridge, a practising Barrister, who on the death of his father, Chief Justice John Duke, Lord Coleridge, 1894, had succeeded to the Peerage, was on October 12, 1907, appointed a Justice of the King's Bench Division of the High Court of Justice.

<sup>15</sup> There is one rather curious instance of promotion. Sir John Fortescue Aland, a puisne Judge of the Queen's Bench, 1718, was transferred, 1729, to the Common Bench and created Baron Fortescue of Credan in Ireland, 1746.

It will be seen that there was no objection to a Judge sitting as a Peer of Parliament in the House of Lords, but that he had as Judge no right to a seat.

In the English House of Commons the case was different. So long as the Judges sat in the House of Lords they were necessarily excluded from the Lower House. There is no known instance of an English Common Law Judge sitting in the House of Commons except during the time of the Commonwealth; they were considered disqualified at the Common Law, and a resolution was passed by the House of Commons in 1605 excluding them, "they being Attendants as Judges in the Upper House."<sup>16</sup>

The Scottish Judges had no such duty in the House of Lords; and they continued to be qualified to sit as members of the House of Commons of Great Britain for several years after the Union in 1707, but they were excluded by Statute in 1734.<sup>17</sup> Ireland had not been united to Great Britain with one Parliament when the Constitutional Act was passed in 1792; and consequently the constitutional rules of that Island were not considered in determining the constitution of the Canadas.<sup>18</sup>

On the Chancery side, of course, the Lord Chancellor could not be a member of the House of Commons; but the Master of the Rolls, not being a member of or attendant in the Upper House, was not disqualified at the Common Law; it required a statute, and no statute was passed disqualifying him until the general Act of 1875.<sup>19</sup>

<sup>16</sup> 1 Commons Journal, p. 257; Anson's *Law and Custom of the Constitution*, 2nd ed., 1892, p. 76; Porritt's "The Unreformed House of Commons," Cambridge, 1903, Vol. 1, p. 220. The recent legislation (1875) 38, 39 Vict. Chap. 77, Sec. 5 (Imp.) has taken the place of this rule.

<sup>17</sup> 7 Geo. II, Chap. 16, Sec. 4. "The legislation was then hurriedly brought about to meet a political emergency growing out of the Earl of Islay's management of Scotland for Walpole." Porritt, Vol. 1, p. 220.

<sup>18</sup> It may, however, be said that Judges were allowed to become members of the Irish House of Commons; even after the Union and notwithstanding the far reaching statute of 1801, 41 Geo. III, Chap. 52, Irish Judges were not excluded until 1821 when the Statute, 1, 2, Geo. IV, Chap. 44 was passed which by Sec. 1 provided for their exclusion.

<sup>19</sup> 38, 39 Vict., Chap. 77, Sec. 5. See Taswell Langmead's "English Constitutional History," 1905, p. 339; May's *Parliamentary Practice*, 11th ed., p. 30; also the Debates on the Judges' Exclusion Bill, 1853, 125 Hans. (3rd ser.) p. 1080; 127 *ibid.*, 993. The Judge of the High Court of Admiralty was excluded by (1840) 3, 4, Vict., Chap. 66.

By the Constitution of Britain, then, at the time of the institution of the Province of Upper Canada, there was no objection to any Judge, Common Law or Equity, sitting as a member of the Upper House; no Common Law Judge could sit as a member of the House of Commons, but there was no objection to an Equity Judge, if he was not connected with the House of Lords as Peer or Speaker.

There was, however, another body at Westminster, the Cabinet, to which anyone a member of either House could belong. In the Province the correlative of this was the Executive Council, but there was no necessity for an Executive Councillor belonging to either House of Parliament.

UPPER CANADA—THE LEGISLATIVE COUNCIL.—The Legislative Councillors were nominated by the Crown and held their office for life; from the beginning the Chief Justice of the Province was a member of this House and Speaker appointed as such by an instrument under the Great Seal of the Province.<sup>20</sup> This was by analogy to the duties of the Lord Chancellor; the Chief Justice of the Province was, indeed, a Common Law Judge, but the Lieutenant Governor was himself the Chancellor of the Province, being entrusted with the Great Seal, and he could not sit in the Legislative Council. Accordingly the highest judicial officer in the Province was made Speaker. This practice continued during the whole of the separate existence of Upper Canada and until the union of the Canadas by the Union Act of 1840.<sup>21</sup>

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<sup>20</sup> It is sometimes said that the Chief Justice filled this office (and that of President of the Executive Council) *ex officio*—see, for example, General Robinson's "Life of Sir John Beverley Robinson, Bart.," etc., Edinburgh and London, 1904, at pp. 199, 200—but this is an error. The Constitutional Act (1791) 31 Geo. III, Chap. 31, by sec. 12 provides "that the Governor or Lieutenant Governor of the . . . Province . . . or the Person administering His Majesty's Government therein . . . shall have power and authority from time to time by an Instrument under the Great Seal of such Province to appoint and remove the Speakers of the Legislative Councils . . ."

<sup>21</sup> 3, 4, Vict., Chap. 35. This continued the power of the Governor to appoint and remove the Speaker of the Legislative Council, Sec. 9. Sir John Beverley Robinson was Chief Justice of the Province until 1862, and by that time the Act of (1857) 20 Vict., Chap. 22 (Can.) prevented anyone (not being a Minister of Crown or a Member of the Executive Council) who held any office at the nomination of the Crown with an annual salary from being eligible as a Member of either House.



The first seven Chief Justices of the Province were Members and Speakers of the Legislative Council and were undoubtedly most useful in promoting useful legislation.

The first Chief Justice, William Osgoode, (1792) an English Barrister, was warmly praised by Lieutenant Governor Simcoe, although Simcoe had serious doubts "whether any of the gentlemen of the Law (excepting the Chief Justice) should have a seat in the Executive or even in the Legislative Council, unless in the latter it be necessary to prevent the Judges from being elected in the House of Assembly as is now the practice in New Brunswick."<sup>22</sup> Osgoode is believed to have drawn the Act for abolishing slavery in 1793; and it is certain that he drew the Acts introducing the English civil law, 1792, and establishing a Court of King's Bench in 1794; he also drafted a Marriage Act in 1792. When Osgoode left Upper Canada in the summer of 1794 to become Chief Justice of Lower Canada, Simcoe wrote to King, the Under Secretary at Westminster, "I shall feel an irreparable loss in Mr. Chief Justice Osgoode; I hope to God he will be replaced by an English lawyer."<sup>23</sup> John Elmsley (also an English Barrister) was appointed in 1796; he came to Upper Canada after Simcoe had left the Province and before his successor, General Peter Hunter, arrived in 1799; until the arrival of Hunter, Peter Russell, the President of the Executive Council, was Administrator of the Government and he appointed Elmsley to the Legislative Council and as Speaker thereof. Elmsley also took an active part in framing legislation and guiding it through the Upper House. During his time the Executive Council decided that

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<sup>22</sup> Letter, Simcoe to Secretary Dundas, London, August 12th, 1791, *Can. Arch.*, Q. 278, pp. 283 et seq. He lived up to his views; while he appointed several to the Councils none of them was a lawyer except (Sir) David William Smith and he was a lawyer only in name, having received his licence to practise as an Advocate under the Act of 1794 which authorized the Lieutenant Governor to license not more than sixteen persons to act as Advocates and Attorneys. He had no legal training and was one of the four Advocates who did not become Barristers when the Law Society of Upper Canada was organized in 1797.

Simcoe also appointed Richard Cartwright, John Munro, Richard Duncan and Robert Hamilton who were judges of one or other of the Courts of Common Pleas, and also Peter Russell who afterwards acted as a Judge of the Court of King's Bench, but none of them was a "man of law."

<sup>23</sup> Letter, Simcoe to King, Navy Hall, June 20, 1794. *Can. Arch.* Q. 280 pt. 1, p. 176; he did not want a Chief Justice from the American Colonies—such as were Peter Livius and William Smith in Lower Canada with whom the Governors found it hard to get along.



the Reports of Legislation for the Home Government should be prepared by the Chief Justice and the Attorney-General, concerning the Bills originating in the Legislative Council and the Legislative Assembly respectively. Elmsley's reports are most instructive and should be read by all who would understand our early legislation.<sup>24</sup>

When in 1802 Chief Justice Elmsley left the Province to become Chief Justice of Lower Canada, he was succeeded as Chief Justice of Upper Canada by Henry Allcock,<sup>25</sup> another English Barrister who had been appointed a puisne Judge of the Court of King's Bench of Upper Canada in 1798 on the recommendation of Elmsley.<sup>26</sup> Allcock was summoned to the Legislative Council in January, 1803, and made Speaker.<sup>27</sup> While Allcock was puisne Judge, a scheme of establishing a Court of Chancery was in the air. He desired to be Master of the Rolls in the Court to be established, the Lieutenant Governor of course

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<sup>24</sup> See, for example, his report, July 23, 1799, of the Acts of 1799, *Can. Arch.*, Q. 287, pt. 1, pp. 1-6. The Report is made to his Honour the Administrator, Peter Russell (General Peter Hunter, the second Lieutenant Governor, did not arrive until August 1799), and points out that one of the Acts had been prepared by him "in obedience to verbal instructions from" His Honour; another was "verbatim the same as that drawn by the Attorney General (John White) and transmitted to Europe in 1797 except that the passages objected to by His Grace the Duke of Portsmouth are omitted," etc., etc.

<sup>25</sup> The name is almost invariably spelled "Alcock" by our historians and legal writers. He always spelled it "Allcock," as will be seen on the Records of the Court of King's Bench. He was remotely related to the family of Pepys, the well-known diarist.

<sup>26</sup> In a letter to King, the Under Secretary, dated from Upper Canada, October 25th, 1797, Elmsley recommends for the third seat on the King's Bench (he himself occupying the first, and William Dummer Powell the second) "Henry Alcock of Lincoln's Inn, formerly a pupil and still an intimate friend of your Brother Edward; Richard Grisley of the Midland Circuit . . . ; Samuel Rose of Chancery Lane, Editor of the late edition of Comyn's Reports; Benjamin Winthrop and John Williams, both of Lincoln's Inn and both well known to your brother Edward." *Can. Arch.*, Chap. 283, p. 302. Of these Samuel Rose is the only one known to fame; he was Cowper's friend. Williams was not the John Williams who with Burn brought out the 10th and 11th editions of Blackstone's Commentaries. That John Williams was of the Inner Temple and was a Serjeant from 1794.

<sup>27</sup> The Journal of the Legislative Council notes that at York on Thursday the 27th, January, 1803, "the Honourable Henry Allcock produced his Writ of Summons to attend the Legislative Council under the Great Seal of the Province" and that he was sworn in. Then "he also produced a Commission under the Great Seal of the Province appointing him Speaker of the Legislative Council. Which was likewise read and he took his seat accordingly." 7 *Ont. Arch. Rep.*, (for 1910) p. 175.

being the Chancellor.<sup>28</sup> He drew up in 1801. an admirable plan for such a Court which was submitted to and approved of by the Chief Justices Osgoode and Elmsley; the Home Authorities did not look upon the scheme with enthusiasm and it was not carried into effect.<sup>29</sup>

Chief Justice Allcock went to England in 1804 and in his absence the Honourable Richard Cartwright, a layman, but who had been one of the Judges of the Court of Common Pleas for the District of Mecklenburg (renamed the Midland District in 1792), was given a Commission as Speaker and officiated for the Sessions of 1805 and 1806; Allcock did not attend at either session.

In the latter year, Allcock succeeded Elmsley as Chief Justice of Lower Canada and was succeeded as Chief Justice of Upper Canada by the Attorney General, Thomas Scott, a Scotsman, but a member of the English bar.<sup>30</sup> Having employment under the Crown in Lower Canada, he was in 1800 on the death of John White, the first Attorney General of the Province of Upper Canada, appointed his successor.<sup>31</sup>

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<sup>28</sup> Elmsley, writing to King from York, February 1, 1799, about Allcock, "my friend . . . appointed at my request" goes on to say, "Alcock hears that a Court of Equity is to be established with a Master of the Rolls and he wants it in lieu of the King's Bench."

<sup>29</sup> See letter, Lieutenant Governor Hunter to the Duke of Portland, York, August 1, 1801, *Can. Arch. Q.* 290, pt. 1, pp. 88 et seq. Portland's answer, Downing Street, October 13th, 1801, *Can. Arch., Q.* 290, pt. 1, pp. 95-112; Hobart's letter to Hunter, Downing Street, April 8, 1802, criticised the scheme, *Can. Arch. Q.* 292, pp. 22 et seq., and it was revised. A carefully prepared scheme was again submitted to the Home authorities: letter, Hunter to Lord Hobart, York, November 18, 1802, *Can. Arch., Q.* 293, pp. 105 et seq.; letter Allcock to Hunter, York, November 17, 1802; *Can. Arch., Q.* 293, p. 111,—but it does not seem to have been approved. When Allcock was going to England in 1804, it was revived, but apparently it fell through, as we hear nothing further of it; Hunter to Lord Camdon, York, September 15th, 1804, *Can. Arch., Q.* 297, pp. 140, 141, 164.

<sup>30</sup> He was the son of the Reverend Thomas Scott, a Minister of the Kirk of Scotland, and intended to follow the same sacred calling. Like many other "probationers," he became a tutor; and while such in the family of Sir Walter Riddell, a noted Advocate of Edinburgh, he was persuaded by his employer to study law.

<sup>31</sup> John White was killed in a duel in York (Toronto) January, 1800; Hunter wrote to the Duke of Portland from Quebec, February 10, 1800, (*Can. Arch., Q.* 287, pt. 1, p. 106) that "Mr. Gray the solicitor General being a very young man not as yet possessing sufficient professional knowledge and there being no person in either of the Canadas who I could recommend as well qualified to fill that Station, I must therefore rely upon Your Grace sending out as soon as possible a Gentleman sufficiently qualified in all respects to fill that

On being appointed Chief Justice, he received a summons to attend the Legislative Council as a Member, and also a Commission under the Great Seal from the new Lieutenant Governor, Francis Gore;<sup>32</sup> and he continued to be Speaker until his resignation in 1816.

Thus far it cannot be said that the Judges who were members of the Legislative Council played any part in the government of the Province except as carrying out the policy determined on by the Governor; except in mere matters of detail there is no evidence that any of them had any influence with the Governors in determining their policy. They were all members of the Executive Council, which to a certain extent corresponded to the Cabinet in England; but "Governor" was not a *lucus a non lucendo*; the Governor actually governed and his Executive Councillors were responsible to him and to the King only.

Of the next incumbent of the Chief Justiceship of the Province, William Dummer Powell, the same cannot be said. Born in Boston, Massachusetts, before the Revolution, of Loyalist stock, educated in Boston, in England, and in the Low Countries, a practising lawyer in Montreal, he was in 1789 appointed First Judge of the Court of Common Pleas for the District of Hesse (Detroit) and in 1794 became the first puisne Judge of the Court of King's Bench. A man of great ability and learning, of more energy and ambition, he in 1816 after many years of waiting, when often hope deferred made the heart sick, attained one of the objects of his desires, the Chief Justiceship of the Province. He was summoned to attend the Legislative Council and received a Commission as Speaker.<sup>33</sup> His appointment as Chief Justice was due to the recommendation of Lieutenant Governor, Francis Gore,

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important office," to which Portland replied from Whitehall, July 24th, 1800, (Can. Arch., Q. 270, A. p. 209) that "Thomas Scott, Esquire, of Lincoln's, Inn" had been appointed.

<sup>32</sup> At the opening of the Session of 1807, he produced his Writ of Summons to attend the Legislative Council and also his Commission as Speaker, York, February 2, 1807, 7 Ont. Arch. Rep. 275.

<sup>33</sup> Powell had headed the list of persons recommended by Lord Dorchester for both the Executive and Legislative Councils, but for some reason, still not clear, he was not appointed. It seems not improbable that a suspicion of his wholehearted loyalty had something to do with this: this suspicion was undoubtedly entertained in many quarters for years. It apparently began with an illtempered remark of the Scottish Surgeon-Judge Mabane, Judge of the Court of Common Pleas in the old Province of Quebec and was originally based upon Powell's going to and remaining for some months in Boston, after the peace of 1783, in the attempt to get back his father's



who had a high opinion of his merits and to whom he had been useful as a member of the Executive Council—especially in the storm in a mustard pot of the quarrel with William Firth who had succeeded Scott as Attorney General.<sup>34</sup>

confiscated property. A more precise accusation was afterwards made against him at Detroit, based upon a letter found in his room which he always (and apparently with truth) contended was forged. He, however, went to England to clear himself of the suspicion. Powell also was first on Dorchester's list of Legislative Councillors, but did not appear on the list of Executive Councillors recommended by Sir John Johnson (son of the celebrated Sir William Johnson) Superintendent of Indian Affairs in Canada, who expected himself to be appointed the first Lieutenant Governor of Upper Canada. When Powell was absent in Spain in 1807 Lieutenant Governor Francis Gore was urged to appoint him to the Executive Council; but Powell did not accept at the time because there was no seat with a salary attached; later on he received an appointment with a salary.

<sup>34</sup> Some account of this row is given in Kingsford's History of Canada, Vol. VIII, pp. 113, 114. The following is an account given by Powell himself, taken from a MSS in the Toronto Public Library:

"From this period (i. e., from his appointment to the Executive Council) Mr. P. was much in the confidence of the Lt. Governor, who engaged him in various attempts to correct abuses which had been long sanctioned. The first was a gross injustice to the Secretary of the Province, who was the organ for issuing Patents to the Grantees of Land, and who, as a remuneration, had been assigned a due proportion of the fee allowed by the King to be taken on each Patent.

In this distribution of the fee, the Atty. General's claim to any was questioned by the Secretary of State, as all the Patents were printed from one form, but at the same time, upon a representation by the Atty. General that it was his duty to Engross on each Patent, his Grace consented that an adequate fee for that Service should be carved out of the various proportions of the other Patent Officers. Under pretext of this Sanction one-half the fee assigned to the Secretary of the Province was taken from him for the Atty. General, and a further deduction was made from the Secretary's Share, for the Clerk of the Council, who had really no privity with the Patent, his duty being concluded with the order made on the Petition for a Grant. The Attorney had not long enjoyed the claim to engross the Patent, for which duty he received half the Secretary's fee, before he represented to his friends in the Council that the engrossing the Patent, which he claimed as a right, was in fact the Duty of the Secretary, and prayed that it might be transferred to that Officer. The Secretary made no Objection to the Service, but very naturally demanded that his full fee should be restored to him; this just demand was refused, and he was peremptorily required to engross the Patents and leave the half fee with the Attorney. The undivided fee on ordinary Grants was small, and scarcely compensated the Stationer, but the major part of the Patents were gratuitous from the Crown, and the half fee only was accounted for to the Secretary, who was out of pocket by each half fee Patent four shillings, for in addition to the hurt proceeding on the division of the fee, the Patent was required to be engrossed on parchment by the Secretary though the Attorney General had been allowed to use Paper. This Course could not escape animadversion, and the Executive Council strongly recommended relief to the Secretary, declaring that the further imposition upon that officer must be ruinous, as he actually lost six shillings by each half fee Patent, and they amounted to many thous-



Powell was of great assistance to Gore also in his controversy with Wyatt, the Surveyor General, which was to a great extent on a line with the Firth squabble.<sup>35</sup> Gore was not easily led, but generally he was guided by Powell's advice, which caused Powell to be regarded as the real master of the administration; and consequently he has been credited with some proceedings as to which he was wholly innocent.<sup>36</sup>

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and in each year. It will scarcely be credited that the Officer to whom this report was made, Lt. Governor Hunter, who actually profited by each Patent in the proportion that the Secretary lost, took no other notice of this representation than to procure from the Secretary of State permission to augment the gross fee on the Patent, leaving the division as before. Lt. Gov. Gore was sensible of this Injustice, and the first duty in the Executive Council imposed on Mr. P. was to probe the Evil and devise a remedy. In the progress of his Obedience to this Command, it was unavoidable that offence should be given to some, but finally the whole Council acquiesced that in issuing of Patents the Secretary had incurred very great loss out of Pocket, amounting to about £2,000, that there remained of engrossed Patent not issued from the office from various causes as many as amounted to £400, for his share of the fees, which last sum was advanced to him by Lt. Gov. Gore, and the gross loss recommended to the notice of His Majesty's Government, who paid to the Secretary £1,000 on account; and for his relief in future Mr. P. suggested a very simple mode of relief, which was to estimate the actual charge on each Patent for stationery and deduct that amount from the gross fee before division amongst the Patent Officers, which it was surprising had not been resorted to before, for the Secretary only disbursed anything towards the Patent.

The result of this Effort was not favorable to Mr. Powell's popularity at the Council board, however it might recommend him to the Head of the Government, who had most excellent dispositions towards a just and impartial administration. He was susceptible to a degree to any Insinuation of personal Disrepute, which subjected him to be played upon by pretended friends who knew his weakness. Upon more than one occasion such ridiculous suggestions interrupted for a time the harmony between him and Mr. P." [largely over fees]

<sup>35</sup> This is also referred to by Kingsford, *Hist. Can.*, Vol. VIII, p. 94. At our Bar it is remembered by the fact that in the report of the trial of an action for libel brought by Wyatt against Gore in the King's Bench in England, *Holt's Nisi Prius Cases* (1816) p. 299, the Province of Upper Canada is at p. 300 called "the Island." The case is still a leading case on privilege and publication.

<sup>36</sup> For example, Gore's extraordinary Act of proroguing the House in February, 1817, (as to which see Kingsford, *Hist. Can.* Vol. IX, p. 206) was certainly against Powell's advice. "This Gentleman (i. e., Gore) in the last act of his Government, which was not satisfactory at home, had acted in direct opposition to the most urgent advice and Intreaty of Mr. P., in dismissing his Assembly from apprehension of some expected Resolutions. He had from this very Assembly received the most handsome Expression of Regard and Confidence in several Votes, one of three thousand pounds for a Service of Plate to himself, and the vote of one thousand pounds on his recommendation to Mr. Powell for services long since rendered extra-judicially, and which had never been compensated."

When Gore left for England, June, 1817, he was succeeded for a time by Samuel Smith (as Administrator); and he by Sir Peregrine Maitland in August, 1818. Maitland remained Lieutenant Governor until 1828, though Smith acted as Administrator for a few months in 1820 during his absence. Maitland never placed any confidence in Powell, but Powell has been charged with some of his acts which have been considered most reprehensible.<sup>37</sup> Powell on more than one occasion differed from the administration of Maitland and, although he was Speaker of the Council, he caused "Dissents" to be entered on the Records.<sup>38</sup>

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<sup>37</sup> In my "Robert (Fleming) Gourlay as shown by his own Records," published by the Ontario Historical Society, 1916, in their Papers and Records Vol. XIV, I have given the story of his alleged persecution of Gourlay. The fact is that Powell had nothing to do with the passing of the legislation under which Gourlay was prosecuted; he advised Gore against prosecuting Gourlay; and after Gore's term when he was prosecuted by Maitland's Government, Powell was not even consulted. By that time Powell was wholly out of favour, and the trusted advisers of the Government were Dr. Strachan (the Anglican divine) and the able and vigorous Attorney General, John Beverley Robinson.

<sup>38</sup> His story of these "Dissents" is as follows: "In 1821 . . . he perceived a spirit of intrigue had obtained access to the Legislature, and had been constrained to enter on the Journals his dissent to certain measures carried in opposition to him. . . .

The various dissents so entered on the Journals are here transcribed, that they may speak for the truth and justice of him, who in the conflict of opinions stood almost alone in the House he presided in. His chief opposer was the Reverend friend who had influence to persuade the Governor that the measures dissented to by the Speaker on the Journals were most wise, useful, and loyal; and that the Speaker was moved thereunto by base and personal considerations, reflecting not only upon the majority in both Houses but on his Excellency and his legal advisers, who signified his assent to the Law; but as the Journals were transmitted to the Secretary of State, it was thought proper to remove from them the obnoxious dissents, lest they might have more influence in Downing Street than York; and as inducement to remove them before they reached England His Excellency was persuaded to command the Speaker to withdraw from the Journals the several dissents he had entered while Speaker, as being a breach of privilege of that office to oppose the majority of that House whose servant he was.

He, having discharged his duty, as he thought, in those dissents, consented to their abolition rather than quit his station as Speaker and Chief Justice—the threatened penalty of his refusal, and the Governor engaged two Members to move and second their removal from the Journals, which was carried without opposition.

Such a transaction, it may be supposed, did not conduce to harmony or kind feeling among the leading parties; but he, conscious of no offence to his King or Country, still struggled to preserve his station to the age of seventy, to which he had ever limited his public services, and which was fast approaching.



Nevertheless he continued to be Speaker until his resignation in 1825.<sup>39</sup>

He was succeeded by William Campbell, the first of our Judges to be knighted. He was a Scotsman who had come to this continent during the American Revolution, as a private in a Highland Regiment, and was taken prisoner at Cornwallis' surrender of Yorktown in 1781. On peace being declared in 1783, he went to Nova Scotia, was called to the Bar and became a Member of the Legislative Assembly of that Province and Attorney-General of Cape Breton; he was appointed a puisne Judge of the Court of King's Bench, Upper Canada, in 1811 and proved himself a

#### DISSENTS OF 1821.

Dissentiet—From the Bill passed yesterday entitled "An Act to repeal the Laws now in force granting poundage to the Receiver General of this Province and to provide a salary for that officer in lieu of such poundage."

(Signed) W. D. P.

Entered on the Journals 21st December, 1821.

Dissentiet—To the Bill entitled "An Act to appoint Trustees to the Will of William Weeks, late of York, Esquire, deceased, to carry into effect the provisions thereof;" because there is not before the House sufficient inducement to justify such an Enactment.

(Signed) W. D. P.

Entered on the Journals 4th January, 1822.

Dissentiet—From the vote to concur in the Resolution sent up to this House from the Commons House of Assembly to address His Excellency the Lieutenant Governor to transmit, by a particular individual, to the foot of the Throne the joint Address of the Legislative Council and House of Assembly to His Majesty, because, however glossed I consider it an undue interference with His Majesty's Representative in the exercise of a Right admitted and declared to exclude all participation by any other branch of the Legislature.

(Signed) W. D. P.

Entered on the Journals 8th January, 1822.

Dissentiet—To the Bill entitled "An Act to authorize the appointment of a Commissioner for the purposes therein mentioned;" because the provision of the Bill is unusual, and unnecessary to enable the Executive branch of the Constitution to exercise its powers in such manner as its own discretion may direct.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

Dissentiet—To the Bill entitled "An Act granting to His Majesty a sum of Money to provide for the appointment of a Commissioner for the purposes therein mentioned;" because it is unasked, and unnecessary to enable His Majesty's Representative to transmit duly to the foot of the Throne the sentiments of the other branches of the Legislature.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

<sup>39</sup> His correspondence with Gore after the latter's removal to England should be read by everyone wishing to understand the inner politics of the period. The letters are in the Toronto Public Library.

sound lawyer. On Powell's retirement, Campbell was appointed to the Legislative Council and received a Commission as Speaker.

At that time, in great measure owing to an almost entirely erroneous impression of Powell's influence and to some extent to the influence of a similar movement in Lower Canada, there was an agitation against the Chief Justice of the Province being a member of the Executive Council; but there was no objection taken to his being a member of the Legislative Council. Notwithstanding this agitation, Campbell was appointed to the Executive Council as well as to the Legislative Council. His incumbency of these positions was during a period of considerable public turmoil. He seems to have kept aloof from prominence in the contentions raging about him; to a certain extent this was due to age and ill-health, but not wholly. While he was a man of resolute spirit, he was also cautious and conciliatory.<sup>40</sup>

The agitation against the Chief Justice being a member of the Executive Council did not die down with Campbell's appointment. We find the House of Assembly, January 13, 1826, passing a Resolution against the practice.<sup>41</sup> It is likely that the corresponding agitation in Lower Canada had its influence on the Upper

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<sup>40</sup> He was sixty-six when appointed Chief Justice, and it was common knowledge, at the time, that he was appointed to keep the place warm for John Beverley Robinson, the Attorney-General and quite the ablest man in the Province—who was supposed to be too young for the appointment.

The Rev. Dr. Strachan, writing to Lord Bathurst from London, November 10, 1826, speaks of Campbell thus: "The Chief Justice is an old man and though of resolute spirit and apt to labour far beyond his strength is liable to sudden attacks of the most alarming nature and from which persons of less energy of mind would not soon recover." *Can. Arch.*, G. 63, pt. 1, p. 54.

<sup>41</sup> Campbell presented his Commission as Speaker November 7, 1825 (*Journals Leg. Col. U. C.* p. 3); he became a member shortly afterward—this being the only instance of a Speaker who was not a member of the Legislative Council. The House of Assembly January 13, 1826, passed a Resolution by a large majority "that the connection of the Chief Justice . . . with the Executive Council wherein he has to advise His Excellency upon Executive measures, many of which may bear an intimate relation to the Judicial duties he may have thereupon to discharge is highly inexpedient tending to embarrass him in his Judicial functions and render the Administration of Justice less satisfactory if not less pure." Carried, 23 to 14. A resolution was also carried to render the Judges of the King's Bench "as independent of the Crown and of the people as are the Judges of England." Carried unanimously.

The final Resolution was that an humble address should be presented to His Majesty "to discontinue to impose on the Chief Justice duties so incompatible with his judicial character and so ill suited to the present state of this Province; and that the Judges in this Province may be rendered . . . as independent of the Crown



Province; but the Home Authorities were not convinced,<sup>42</sup> and the system continued until the period of responsible Government. A similar address passed in the House of Assembly, March 15th, 1828, met the same fate as its predecessor.<sup>43</sup> On Campbell's resignation in 1829, he received the honour of knighthood and was succeeded by the first Canadian-born Chief Justice, John Beverley Robinson, the Attorney-General. He also succeeded to the Speakership in the Legislative Council<sup>44</sup> and the Presidency of the Executive Council.

The life of Sir John Beverley Robinson for thirty years, from the time he fought as a young man of 21 at Queenston Heights, may almost be said to be the history of the politics and government of the Province. An absolutely honest and consistent Tory of the old school in Church and State, he never failed to uphold the cause of his Church and his conception of the State. He consistently fought Responsible Government, equality of religious denominations, democratic innovations. His life has been writ-

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and of the people as are the Judges in England." Journals of Assembly p. 72. The Petition will be found at p. 76 and also Can. Arch. Q. 340, p. 39. Maitland agreed to transmit the address, but said, "I am not enabled to explain to His Majesty's Government what there is peculiar in the present state of this Colony which you allude to in the conclusion of your address as inducing you to desire the change which you solicit." In his letter to Lord Bathurst, March 7, 1826, Maitland says, "It is scarcely necessary to remark that if the Chief Justice were not a member of either Council, the Government and the Province would lose the advantage of the experience and legal knowledge of an officer who it must be presumed is in general best qualified to advise in measures of importance . . ." Can. Arch. Q. 340, p. 41.

<sup>42</sup> Bathurst wrote to Maitland from Downing Street June 6, 1826, that "it is highly expedient that the Governor should have the advice and assistance of the first Law authority of the Province for his guidance in the administration of his Government; that the greatest advantage has been derived throughout the Colonies from this assistance and it does not appear that there is anything peculiar in the state of the Province of Upper Canada, which should make it advisable that this system should be changed." Can. Arch. G. 62, p. 158.

The movement to exclude the Chief Justice from the Executive Council was parallel to and in a sense a part of the wider movement for Responsible Government.

<sup>43</sup> This may be conveniently found in Read's "Lives of the Judges of Upper Canada and Ontario," Toronto, 1888, pp. 127, 128; it was carried 16 to 6.

<sup>44</sup> A little before the resignation of Campbell, the Hon. James Baby was commissioned Speaker. He presented his Commission January 8, 1829. (Jour. Leg. Col. U. C. for 1829 p. 6). He was Speaker during that Session, January 8-March 20, 1829. At the opening of the next Session the new Chief Justice presented his Summons and Commission, January 3, 1830.

ten from one point of view by his son; various parts of it from another point of view by the historians, Kingsford, Dent and others, and no attempt will be made here to retell it.<sup>45</sup> He continued to be Speaker of the Legislative Council until he went to England in 1838, at the request of Lord Glenelg who wished to consult him on Canadian affairs; and he never again took his seat in the House.

When the Legislative Council began its session in 1838, the Honourable Jonas Jones, puisne Judge of the Queen's Bench, presented his Commission as Speaker.<sup>46</sup> He had been appointed to the King's Bench in March, 1837, while King William IV was still alive.

Jones was, like Robinson, of United Empire Loyalist stock, a Tory of the stern, unbending, even violent kind. He had played a prominent and in the main useful part in the House of Assembly from 1821, and was a keen-minded, clear-headed man, who had the courage of his convictions and never had any doubt as to what they were.

The Legislative Council under his speakership bent every energy to prevent the impending union of Upper and Lower Canada, and the Speaker fully approved; but it was in vain. The Union Act of 1840 became law, and Upper Canada lost its independent provincial existence.

Jonas Jones was the last Speaker of the Legislative Council of the Province of Upper Canada; and also the only puisne Judge ever summoned as a Member.<sup>47</sup>

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<sup>45</sup> Major General C. W. Robinson, "Life of Sir John Beverley Robinson, Bart., C. B., D. C. L.," Edinburgh and London, 1904; Dent, *Story of the Upper Canadian Rebellion*, Toronto, 1885, see Index Vol. II, p. 375; Kingsford, *Hist. Can.*, see Index Vol. X, p. 644; Read "Lives of the Judges," pp. 122-148, etc.

<sup>46</sup> *Jour. Leg. Col. U. C.* 1839, p. 5.

<sup>47</sup> While it is beyond my present thesis, I may say that when the Legislative Council of the new Province of Canada met for the first time, June 14, 1841, Robert Sympson Jameson, Vice Chancellor of the Court of Chancery of Upper Canada presented his Summons as a member and his Commission as Speaker of the Council (*Jour. Leg. Col. Can.* 1840, pp. 13, 19). He continued to be Speaker till the Session of 1843; his resignation tendered early in the Session the Governor Sir Charles Metcalfe refused to accept and Jameson took his seat to secure a regular adjournment of the House and give the Government time to consider (*Jour. Leg. Col. Can.* 1843, p. 42, Monday, Oct. 16, 1843). This was part of the general agitation over Responsible Government; but what impelled Jameson to insist on resigning was the proposal to remove the Capital to Montreal, which he opposed in common with most of the other Councillors

Of every one of the Judicial Members of the Legislative Council except the last named it may be said that he was most useful and efficient in framing and correcting ordinary legislation. Of not one without any exception can it be said that he ever suggested or promoted any measure looking to reform or to a more democratical government. Without exception they were conservative and aristocratical to a degree and none could find anything wrong in the existing state of affairs. All men of fine minds, good intentions, they all were reactionaries and at least passively, if not actively, set themselves against the current of democracy and popular government which must needs prevail if Canada was to be saved for the Empire.

*(To be concluded)*

WILLIAM RENWICK RIDDELL.\*

TORONTO.

\*Justice of the Supreme Court of Ontario.

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from Upper Canada. His resignation tendered again was accepted; Monday, November 6, 1843, he announced the resignation and acceptance and two days afterwards, the Hon. René E. Caron presented his Commission as Speaker (Jour. Leg. Col. Can. 1843, p. 75). Jameson continued to be a private member of the Council till his death in 1854, but as vice-chancellor he was not considered a Judge; e. g., he was a Bencher and Treasurer of the Law Society of Upper Canada for years after being appointed Vice-Chancellor.

The Statute of 1857, 20 Vict. Chap. 22 (Can.), made all Judges, Chancellors, Vice-Chancellors, etc., ineligible to vote, and all persons (except certain Ministers of the Crown) who accepted or held any office, commission, or employment at the nomination of the Crown, with an Annual Salary, ineligible as a Member of either House.



# MINNESOTA LAW REVIEW



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*Co. v. Kentucky*<sup>90</sup> it suggests the reason for not doing so: "There is an obvious distinction between tangible and intangible property, in that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs, except, perhaps, in the case of mortgages or shares of stock. So, if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicile or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authority is to follow the maxim *mobilia sequuntur personam*." In *Selliger v. Kentucky*<sup>91</sup> the court refused to allow the taxation of warehouse receipts at the domicile of the owner, where the tangible personal property for which they were a receipt was outside the jurisdiction of the taxing state, which meant that the situs for taxation of the receipt was the same as the property and that taxing the property taxed the receipt. The same had already been held with regard to bills of lading.<sup>92</sup>

The determination of situs of personal property where the property is in one state and the owner in another is a subject which for its satisfactory settlement requires an agreement between the states. In other words, it is a question for settlement by interstate comity, which would bring about the adoption of a uniform rule throughout the United States, rather than for each state to adopt whatever rule seems necessary in order to give it the largest possible amount of property subject to taxation by it. The fact that absolute justice and equality can never be reached in taxation ought not to discourage the attempt to make reasonable efforts to remove manifest evils.

EDWIN MAXEY.

UNIVERSITY OF NEBRASKA.

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<sup>90</sup> (1905) 199 U. S. 194, 50 L. Ed. 150, 26 S. C. R. 36, 4 Ann. Cas. 493. This case fully affirms the doctrine that a state cannot tax a domestic corporation upon its tangible personal property permanently located in other states.

<sup>91</sup> (1909) 213 U. S. 200, 53 L. Ed. 761, 29 S. C. R. 449.

<sup>92</sup> *Almy v. California*, (1860) 24 How. (U. S.) 169, 16 L. Ed. 644; *Fairbank v. United States*, (1901) 181 U. S. 283, 45 L. Ed. 862, 21 S. C. R. 648.



## JUDGES IN THE PARLIAMENT OF UPPER CANADA\*

## THE LEGISLATIVE ASSEMBLY

WE have seen that the Common Law rule that Judges could not in England be Members of the House of Commons was based upon the fact that they were at first Members of and afterwards attendants on the House of Lords. *Cessante ratione cessat ipsa lex*.<sup>48</sup> The Canadian Judges not being called upon to attend any other House, there was no reason in law why they should not be elected to the House of Assembly.

In Lower Canada, which had precisely the same Constitution as Upper Canada, the Judges from the very beginning took an active interest in politics and were elected to the House of Assembly. This in the first decade of the nineteenth century created much dissatisfaction amongst the French Canadian portion of the community, as the Judges were all opposed to the majority of the House and their views of government by the people. In Upper Canada there was no instance of a Judge offering himself as a candidate for election until 1800. This was Henry Allcock, afterwards Chief Justice and Legislative and Executive Councillor. At the election for the third Parliament for the Province he was elected member of the House of Assembly for the East Riding of York and the Counties of Durham and Simcoe. He was nominated for the Speakership, but was defeated by the Honourable (afterwards Sir) David William Smith by a vote of 10 to 2, Allcock voting with the majority and afterwards with another member leading the new Speaker to the chair. There was little contentious business, and politics had as yet scarce made its appearance above the surface. But in any case Allcock did not have much opportunity to show his colours. The House met

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\*Continued from 3 MINNESOTA LAW REVIEW 180.

<sup>48</sup> "When the reason of any particular law ceases, so does the law itself." The maxim would be quite true were the word *aliquando* inserted—"sometimes." The story of Mr. Justice Allcock's career in the Lower House can be read in the Proc. Leg. Assy. U. C. 1801, 6 Ont. Arch. Rep. 1909, 176, 183, 186, 192-195, 237. The Petitioners against him were of the official set, which rather indicates reforming tendencies in Allcock, but nothing in his career before or after suggests such sentiments.

May 26, 1801; June 1, a petition was presented by seven of the Freeholders of his constituency that, while Allcock was a gentleman of acknowledged respectability, he had not been chosen by the Petitioners or a majority of the electors; June 10 and 11 the Petition was considered; on the latter day he was declared not duly elected and a writ for a new election was ordered. At this election Allcock was not a candidate. Angus Macdonell was elected and took his seat July 4, 1801, which he kept until his death by drowning in the "Speedy" disaster, 1804, to be succeeded by William Weekes, and Weekes by the Judge now to be spoken of.

The next Judge candidate was a Radical and took a stand against the Government and ruling classes from the beginning to the end of his very interesting and varied judicial career.

Robert Thorpe was a member of the Irish Bar who through the influence of his patron, Castlereagh, was in 1802 appointed Chief Justice of the Supreme Court of Prince Edward Island. Quarrelling with the Governor, he received an appointment in 1805 as a puisne Judge of the Court of King's Bench for Upper Canada.

The Province at that time was in an uneasy condition politically. For the first decade or so of the separate Provincial existence of Upper Canada, the settlers were too busy clearing land, building houses and barns, and making a living for themselves and their families to pay much attention to the government of the Province. The administration of affairs was in the hands of a Governor responsible to the Home Government and an Executive Council responsible only to the Governor. Legislation was made by the House of Assembly and the Legislative Council, the Legislative Council being appointed and always in accord with the Governor.

But settlers were coming in constantly. Land was given free to almost all comers till 1798 when the price was fixed for future grants at 6 pence Halifax (10 cents) per acre and the usual expense of survey.<sup>49</sup> At that very time thousands of acres were being granted to members of the Executive Council and other favourites of the administration free (except for expenses). A grant of 1,200 acres was by no means uncommon, and on one day

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<sup>49</sup> See the Proclamation, October 31, 1798, Can. Arch., Q. 288, p. 192.

11,400 acres were so granted.<sup>50</sup> The official class had many squabbles over the division of the fees for the grant of land, and it was too often the case that the man with the money to pay fees for land would receive attention to the neglect of bona fide settlers less fortunate and even to the Loyalist entitled to a patent without payment of fees.

These and some others were legitimate subjects of complaint; but there was much factious agitation, due to a certain extent to restiveness under autocratic rule, but also to some extent (not now determinable) to treason. Joseph Willcocks who had been a member of the "United Irishmen" and who, emigrating, had been made Sheriff of the Home District by Chief Justice Allcock, and William Weekes, also Irish, who had been a student of Aaron Burr and who was the first law student called to the Bar by the young Law Society of Upper Canada, being now a member of the Lower House, were the leaders of the Radicals. But the House was itself restive and no longer looked with equanimity upon acts which would not be tolerated in England. An opposition was evolving: one example will suffice to show the trend. Governor Hunter in 1803 and 1804 used some of the money raised by the Parliament for public purposes, indeed, but without the assent of Parliament. Administrator Grant, his successor in 1805, followed his example, and in 1806 the Assembly made a formal protest and demand that the money should be replaced.

Thorpe "agin' the Gover'ment" as always, joined himself to the Radicals and on the meeting of Parliament in February, 1806, took the leadership of the group of that way of thinking.<sup>51</sup> He

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<sup>50</sup> I. e., on January 9, 1797, *Can. Arch.*, Q. 289, pt. 1, pp. 3-8, January 3, 1797, the wife and children of Mr. Justice William Dummer Powell received 9600 acres, 1200 acres each, *Can. Arch.*, Q. 289, pt. 1, p. 1. January 9, Chief Justice Elmsley got 5000 acres, and Mrs. Gray, mother of the young Solicitor General, "1200 acres as a small mark of respect for her own character and that of her deceased Husband." *Ibid.*, pp. 3, 47. January 17, the six sons of the Hon. Robert Hamilton (of course a Councillor) "All born in this country" got 1200 acres each, with an expression of regret that more cannot be given, "considering the great benefit Mr. Hamilton has been to this infant Colony and the high Rank he holds." *Ibid.*, p. 10. The list is by no means exhausted.

<sup>51</sup> Writing to Edward Cooke, the Under-Secretary for War and Colonies from York, Upper Canada, under date January 24, 1806, after five months in the Province, he says in a Postscript of date February 5 (Parliament met the previous day): "The Houses of Assembly are sitting and from want of a person to direct, the Lower one is quite wild; in a quiet way I have the reins so as to prevent mischief though like Phaeton I seized them precipitately. I shall



seems to have been the moving spirit in much of the opposition shown to the Administration and probably incited the protest against the unauthorized expenditure by Grant.<sup>52</sup> He inveighed against the Government in his addresses to Grand Juries and welcomed addresses from Juries in the same sense.<sup>53</sup> Weekes having been killed<sup>54</sup> in a duel which he forced on his fellow-barrister, William Dickson, his seat in the House became vacant, and Thorpe became a candidate for the representative of the East Riding of the County of York and the Counties of Durham and Simcoe in the Assembly. The election coming off December 29, 1806, Thorpe obtained 269 votes and his opponent, Thomas Barnes Gough, 159. The returning officer, William Allan, a thorough Tory if there ever was one, returned Thorpe as elected.

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not burn myself and hope to save others." *Can. Arch.*, Q. 305, p. 86, et seq. Report of *Can. Arch.* for 1892, p. 39. "Never prophesy unless you know" is a maxim he forgot.

<sup>52</sup> It was his intimate friend, William Weekes, who reported, February 25, 1806, from the Select Committee appointed February 10 to examine the Public Accounts that £617.13.6 had been expended without the authority of Parliament. 8 *Rep. Ont. Arch.* (for 1911), pp. 79, 90-92.

<sup>53</sup> An attack by Colonel Joseph Ryerson, a Tory United Empire Loyalist, upon Thorpe for his address to the Grand Jury for the London District at Charlotteville in October, 1806, resulted in the only action of *Scandalum Magnatum* ever taken on this Continent. It is an action based upon the Statute of Gloucester (1378) 2 Richard II, Stat. 1, cap. 5, which forbids "false News, Lyes and other such false things" to be said against "Justices of one Bench or the other" and certain others. Although the action had become obsolete in England,—the latest known case was in 1710—Thorpe brought proceedings against Ryerson for *Scandalum Magnatum*, but failed. See my article "Scandalum Magnatum in Upper Canada," 4 *Jour. Am. Inst. Crim. Law* (May, 1913) pp. 12-19. Dent (*U. C. Rebellion*. Vol. 1, p. 87), with that want of common fairness which disfigures a work otherwise valuable, says: "His brother Judges, however, some of whom were members of the Executive Council and all of whom were subject to strong influences from that quarter, ruled that the proceeding could not be maintained . . ." A more offensive and unfounded insinuation could hardly be made. The case was argued twice and was finally decided by Scott, C. J., and Powell, J., January 15, 1808, on the simple and obvious ground that the Statute of Gloucester was speaking of the Judges of either Bench in England and not of a Bench in Upper Canada which did not come into existence for over four hundred years later. I have never heard a lawyer express a contrary view; and it is monstrous to suggest that the judgment was the result of influence from any quarter.

We shall see that the view that Judges of the Court of King's Bench in Upper Canada are not in the same case as the Judges of the Bench, King's or Common, in England is that held by the House of Assembly in the petition against Thorpe's return as a member of the House.

<sup>54</sup> See my article "The Duel in Early Upper Canada" (1915), 35 *Can. Law Times* pp. 726 et seq.; also in the *Jour. Am. Inst. Crim. Law* of the previous month.

When Parliament opened its next session February, 1807, Gough promptly petitioned against the Return, as did a number of the Freeholders of the Constituency. The grounds alleged are the same in both Petitions: "That Robert Thorpe at the time of such election was and still is one of His Majesty's Judges of the Court of His Bench in this Province," "that in England none of the Judges of the Court of King's Bench, Common Pleas, Barrons of the Exchequer who have judicial places, can be chosen Knight, Citizen or Burgess in Parliament . . . that this procedure is unconstitutional, inasmuch as being an attempt to clothe, arm and blend in one person the conflicting powers authorities and jurisdiction of the Legislative and Judicial functions, contrary to the spirit of good government and the immemorial usage and custom of the Commons of England."

The Statute of 1805<sup>55</sup> had provided that on the consideration of a Petition complaining of an undue Election or Return, the House should be cleared and all the members (except him against whose return the Petition was made), with the Speaker, should be sworn and then, the Speaker taking the chair, the doors should be opened and the trial proceed. But there was always the preliminary question, viz: "assuming the facts alleged to be true, should the election be voided and the return set aside?"

Accordingly, the House went into Committee of the Whole on the Petition of the Freeholders to determine "whether the grounds contained in the Petition. . . if true are sufficient to make the election of the sitting member void?" After three sessions, the Committee of the Whole reported that the grounds alleged, if true, were not sufficient to make the election void. The Petition of Gough was given three months' hoist; Gough petitioned that his Petition should be heard, as he had "at great expense procured a Counsel from a distant part of this Province to support the grounds and prayer of his Petition." An attempt to give this new petition the three months' hoist failed. The House went into Committee of the Whole on it and reported that the further consideration of it should be deferred for three months. The Solicitor General, Mr. (afterwards Mr. Justice) D'Arcy Boulton, moved that the report be not received, but was voted down on a division 8 to 6. The division list is instructive as indicating the politics of the members. All the six were Tories,

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<sup>55</sup> (1805) 45 Geo. III, Chap. 3 (U. C.).

one of them afterwards a Judge of the King's Bench; most of the eight were Radicals and at least one of them afterwards strongly suspected of actual treason.<sup>56</sup>

There can be no doubt of the correctness of the decision. Thorpe, no mean lawyer himself, had pointed out to Lieutenant Governor Gore that in England "Judges are considered in the Legislature for which reason many are created Peers, and all Judges have sat in the Commons except such as are constitutionally to attend the Lords to assist when a Court of Justice." He also pointed out that "the Master of the Rolls, the Judges of the Admiralty and Ecclesiastical Courts, the Chief Justices of Ely, Chester and the Welsh Judges, etc., etc., the Judges in Canada and in the other Colonies have constantly sat in the House of Assembly."<sup>57</sup>

Thorpe took a very active part in the Legislative Assembly during the whole of this session, but failed to obtain a majority in any of his attempts to embarrass the Government. He was too radical for the Upper Canada Radicals and sometimes could not obtain a single supporter.

The Lieutenant Governor complained of him to William Windham, the Secretary of State;<sup>58</sup> and Castlereagh, who re-

<sup>56</sup> The proceedings in this unique case will be found in the Proceedings of the Leg. Assy. U. C. for 1807, most conveniently in 8 Rep. Ont. Arch. (1911) pp. 127, 128, 129, 134, 135, 154, 155; the Division List on p. 155. See also Doughty & McArthur Documents relating to the Constitutional History of Canada 1791-1818 pp. 325 et seq.

<sup>57</sup> Can. Arch., Q. 310, p. 83; also letter Castlereagh to Craig, September 7, 1809, *ibid.*, p. 36 in D. & McA. Documents, etc., p. 326, note 2. It is hard to see how men like Boulton and Sherwood could justify their votes.

<sup>58</sup> Letter, Francis Gore to William Wardham, Secretary of State for War and Colonies from York, Upper Canada, March 13, 1807. Can. Arch., Q. 306, pp. 59 et seq.; D. & McA. pp. 327 et seq.; Can. Arch. Rep. for 1892, pp. 61 et seq. His offences are detailed thus:

"Very soon after the arrival of Mr. Thorpe in this Province, his Public Conduct attracted the notice of all considerate men: the Publication purporting to be an Address from the Grand Jury of the Home District on the first Public exercise of his Functions as a Judge, evinced a strong disposition to make the Courts of Justice, the Theatres for Political harangues, and a subsequent one from the Petty Jury (a thing heretofore unknown in this Country) afforded a sufficient proof of a desire in the Judge, to encourage Strictures on the Government from every description of persons, however incompetent they might be to form any correct opinion upon the subject, or however foreign such a subject might be from the occasion for which they were convened. . . .

"Mr. Thorpe's conduct, since he has been elected a Member of the House of Assembly, has been most inflammatory—and however it is to be lamented that the Government have not greater influ-



placed Windham, directed Gore to suspend him.<sup>59</sup> In anticipation of such a direction, Gore with the approval of his Executive Council had left Thorpe's name off the Commission of Assize and Nisi Prius, inclusion in which was at that time necessary to enable Judges to try cases at "the Assizes," their commission as Judges of the Court of King's Bench not extending to the trial of cases civil or criminal at the Assizes or elsewhere than in Banc.<sup>60</sup> This course was absolutely necessary to prevent Thorpe spreading discontent, the charge made against him being none too strong from the Governor's stand-

ence in the House of Assembly, during the Session which has just closed, he had been unable to carry any one point, to embarrass the Government. He moved an Address, which was most insidious, and inflammatory, on the subject, of those Persons who had adhered to the Unity of the Empire—which was rejected. In his proposal for vesting the Power of Appointing Trustees to the Public Schools, in the House of Assembly instead of the Lieutenant-Governor, after a violent Declamation, and abuse of the Executive Government, he asserted, that it was . . . the privilege of The House of Assembly to nominate to office. In this attempt, he was supported by two only. And on a Question relating to the Duties, imposed by the 14th of the King (which Mr. Thorpe contended was at the disposal of the Provincial Legislature) he stood alone! and I am happy to observe, that in the instance of a Judge of the Court of King's Bench, making an attempt to derogate from the authority of the British Parliament, he could not in a popular Assembly, prevail on a single person to join him, notwithstanding, his Pathetic allusion to the Revolt of the American Colonies.

"When the business of the Session was nearly concluded, an address was moved in the House of Assembly, to relinquish their claim to about six hundred pounds, which had been taken out of the Provincial Funds, and appropriated, by the late General Hunter (to particular Colonial purposes) without the concurrence of the other branches of the Legislature, this measure was opposed by Mr. Thorpe with his usual violence, but without effect."

<sup>59</sup> Robert (Stewart) Viscount Castlereagh, who had been Secretary of State for War and Colonies in 1805 was followed by William Windham, February 14, 1806, but regained his place March 25, 1807; this he kept till forced out of the Cabinet by Canning in 1809, when he was succeeded by the Earl of Liverpool.

Castlereagh's letter to Gore, June 19, 1807, is in D. & McA., p. 330. Can. Arch., G. 55, pt. 1, p. 115.

<sup>60</sup> See my articles in the Yale Law Journal, "New Trial at the Common Law," November, 1916, and "New Trial in Present Practice," January, 1918:

"It was not until 1855 (18 Vict. c. 93, s. 43, Can.) that commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery were rendered unnecessary, Parliament providing that such courts should be held at such times as the judges of the courts of common law (by this time a Court of Common Pleas had been formed by (1849) 12 Vict. c. 63 (Can.) with the same powers as the Court of Queen's Bench) should appoint. The judges of the courts of common law were to sit in these courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery with the same powers as though they had commissions as formerly.

point—"That the progress of one of His Majesty's Justices of the Court of King's Bench through the Province in his routine of duty should be dangerous to the peace of the colony may indeed seem strange but it is most certainly true with regard to Mr. Thorpe who appears to consider his character as a Judge but a matter of secondary consideration and to be chiefly ambitious of the character of a Factious Demagogue."<sup>61</sup>

On Thorpe being informed of his omission, he thought he should ask permission to go to England and lay the matter before the Privy Council; but afterwards repented and determined to remain. A meeting of some of his constituents was held at York, which presented an address to him expressing unfeigned sorrow that thereby the eastern part of the Province would be deprived of the instructive lessons and philanthropic instructions flowing from his lips. They also offered, if any attempt should be made to lessen his income, to contribute to alleviate the sufferings of their benefactor. Thorpe declined the present, said that his conduct had been approved of by the Secretary of State and his labours rewarded by the Sovereign, and confidently expected a favourable termination of the matter.<sup>62</sup>

Powell, who had been in England on the way to and from Madrid where he obtained the release from a Spanish American prison at Omoa of his son Jeremiah, had there heard that it was intended to suspend Thorpe. With Gore's perfect approbation, Powell before the arrival of Castlereagh's despatch called

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"By the Common Law Procedure Act of 1856 (19, 20 Vict. c. 43, ss. 152, 153, Can.) the times of the sittings of these trial courts were to be fixed by the judges, and the judges might sit with or without commissions, as the Governor (i. e., the Ministry) should deem best. In 1874 the Administration of Justice Act (37 Vic. c. 7, Ont.) provided for Courts of Assize and Nisi Prius to be held without commissions and that any judge or Queen's Counsel presiding at any court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery should have all the powers which he would have had under commissions under the former practice.

"It may be said that since the act of 1856 we have not had in Ontario commissions for trial courts, except special commissions of Oyer and Terminer, etc., the power to issue which is still continued and has been exercised."

<sup>61</sup> Letter, Gore to Castlereagh, York, Upper Canada, August 21, 1807, Can. Arch., Q. 306, p. 212: Can. Arch. Rep. for 1892, p. 81. The report of the Executive Council is *ibid.*, p. 82.

<sup>62</sup> Can. Arch., Q. 306, pp. 212, 222, 223, 224. Some of Thorpe's constituents did not approve, *ibid.*, p. 328, and indeed they strongly doubted that any such meeting had ever taken place—in which doubt Gore shared, *ibid.*, p. 312. See Can. Arch. Rep. for 1892, pp. 81 et seq., Can. Arch., Q. 310, pp. 87 et seq., 100, 101.



on Thorpe and told him what was coming. He also told him that if he would ask Gore for leave of absence before the matter became public, he would receive it and money to convey him to Europe. That he at once refused, said that he could not be removed without a hearing before the Privy Council, and claimed that everything he had done was by direction of the Secretary of State. He left the Province without leave of absence and without the knowledge of the Governor, believing firmly that Castlereagh would justify him. In an address to his constituents written at Niagara just as he was leaving the Province to go to New York on his way to England, he expressed the hope that his return should be as rapid as his departure was unexpected.<sup>63</sup> His hopes were vain: his suspension was made final and he was succeeded in his Judgeship by Campbell: he never again appeared in Canada; and no other Judge has ever offered himself for election to the Lower House of Upper Canada.<sup>64</sup>

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<sup>63</sup> Can. Arch. Rep. for 1892, p. 89: Can. Arch. Q. 310, p. 24, a contemporary letter (Powell MSS) speaks of him forlorn and in despair leaving Niagara and wonders what will become of his poor wife and children—his wife and helpless children he had expressed his willingness to sacrifice only with his life in doing his duty to England, to the Colony and to the patronage of Sir George Shee, Bart. (Under Secretary for the Home Department 1800-1803). Letter, Thorpe to Shee, Can. Arch., Q. 310, p. 34; Can. Arch. Rep. for 1892, p. 89.

<sup>64</sup> In my article "Scandalum Magnatum in Upper Canada," 4 Jour. Am. Inst. Cr. Law, May, 1913, pp. 12 et seq., already referred to, I give the subsequent career of Mr. Justice Thorpe in the following words:

"Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man.

"It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor, the Sierre Leone Company, organized for the benefit of free blacks on the west coast of Africa. Neither Director nor Manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all implored to let the unfortunate blacks alone. Perhaps his worst offense was making public that while a poor old black settler, Kisil, could not get his pay for work and labor done long before for the Company, Macaulay (then lately Secretary and always Director) received fifty guineas for importing ten tons of rice into England from the West Coast of Africa; and while £14.5.4 was spent "for clothing African boys at school," £107.12.0 went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H. R. H., the Duke of Gloucester, was president; Lords Lansdowne, Selkirk, Grenville, Cal-



I speak only of the Judges of the Supreme Courts, the Courts or King's (Queen's) Bench, Common Pleas, and Chancery. There were two Judges of the old Courts of Common Pleas who became members of the first House—Nathaniel Pettit and Benjamin Pawling, of Niagara (Nassau District), and possibly a third, John Macdonell, of Lunenburg District. After the abolition of these Courts in 1794, one of the former Judges, Edward Jessup of Lunenburg, became a member of the Assembly in the second Parliament and John Macdonell was re-elected.

Of the District Courts (now County Courts) instituted in 1794 and of the Surrogate Courts, there were many Judges Members of the House, many of them laymen. There never was an agitation against Judges being elected at all like that which raged in Lower Canada. The first legislation in this respect in Upper Canada did not pass until 1837 when it was enacted that any member of the House who should become Judge of the Court of King's Bench, of a District Court or any Court of Record to be established (or accept other named offices), should vacate his seat, but it should be no bar to re-election. The curious clause was added that nothing in the Act should be construed to author-

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thorpe, Gambier, and Teignmouth were vice presidents; members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution; and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge.

"Thorpe's pamphlet went through at least three editions; my own copy (of the third edition) is dated 1815.

"Perhaps one moral of this story is that judges should keep out of politics."

It was Lord Bathurst, Secretary of State for War and the Colonies in Liverpool's "purely Tory" Administration of 1812, who gave Thorpe his congé. Gourlay in his "Statistical Account of Upper Canada," Vol. II, pp. 322 et seq., has something to say about Mr. Justice Thorpe. Dent in his U. C. Rebellion Vol. 1 pp. 86-90 gives an account of this "honorable and highminded man whose only fault was that he was too pure for the times in which he lived and for the people among whom his lot was cast." (The author could not have read Thorpe's own letters, copies of which are in the Can. Arch. printed in the Can. Arch. Reports for 1892), Kingsford, Hist. Can. Vol. VII, p. 524; Vol. VIII, pp. 87-103, is less favorable. There is no doubt as to Thorpe's actions. His motives are differently interpreted—*sub judice lis est*. Those interested in Thorpe's charges about Sierra Leone will find them discussed in the Imperial House of Commons (1815) 29 Hans. Deb. 1005, (1815) 30 Hans. Deb. 612.

ize the election to the House of a Judge of the Court of King's Bench, thus leaving the eligibility of such a Judge at large.<sup>65</sup>

After the Union, the Parliament of Canada in 1843 passed a statute which rendered ineligible as members of the Assembly all Justices and Judges of any Court of Queen's Bench or of King's Bench, the Vice-Chancellor of Upper Canada . . . all District Judges or Circuit Judges . . . the Official Principal of the Court of Probate and the Surrogate Court in Upper Canada and many others.<sup>66</sup>

In 1857 the final blow was given to judicial legislators.<sup>67</sup> Of the other Judges appointed during Upper Canada's separate existence, Thomas Cochrane, 1803-1804, is not known to have taken part in politics. D'Arcy Boulton, 1818-1829, was successively Solicitor General and Attorney General and a strong supporter of the Government; Levius Peters Sherwood, 1825-1840, had been a Member and Speaker of the House of Assembly, a Tory—neither of these was an active, or at least an open, politician after his elevation to the Bench. John Walpole Willis, 1827-1828, deserves a chapter to himself. He came from England and quarrelled with everyone in authority, meddled with the House of Assembly, and generally made so much trouble with the Government and its officers that he was "amoved."<sup>68</sup> James

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<sup>65</sup> (1837) 7 Wm. IV, Chap. 114, Secs. 1, 2 (U.C.) reserved for the Royal Assent, promulgated April 20, 1838.

<sup>66</sup> (1843) 7 Vict. Chap. 65 (Can.), reserved for the Royal Assent and proclaimed May 25, 1844. There were subsequent enlarging and explanatory acts (1853) 16 Vict. Chap. 155 (Can.) and (1855) 18 Vict. Chap. 86 (Can.).

<sup>67</sup> (1857) 7 Vict. Chap. 22 (Can.).

<sup>68</sup> "Amoved" is the technical expression always used in this connection. Willis was afterwards sent as a Judge to Demerara and then to New South Wales. He had trouble with the Governor there and was again amoved; this time, however, irregularly, and the Privy Council allowed his appeal (1846, *Willis v. Gipps*, 5 Moo. P. C. 379). But he was forthwith regularly removed and failed to obtain further employment; he died in 1877.

"The statement of the Lord Chancellor (Lord Lyndhurst) at p. 388 of the report in 5 Moore that on the previous occasion 'the order on a motion then appealed from was set aside because the appellant was not heard in Canada' is an error. Sir George Murray said in his place in Parliament, May 11th, 1830, when the matter was brought up by Lord Milton on the occasion of Willis petitioning for redress on the ground that he had acted in good faith: 'The Government had taken the expense (of an appeal to the Privy Council) on itself. The case was argued before the Privy Council. . . . Mr. Willis' complaint amounted to this, that his removal was unwarranted, illegal and ought to be void; and the decision of the council was that it was not unwarranted, not illegal and that it ought not to be void.' (24 Hans. N. S., pp. 551 et seq. [1830]).

Buchanan Macaulay, 1829-1849 (J. K. B.), 1849-1856 (C. J. C. P.), while an Executive Councillor before his appointment to the Bench, was not at all a partisan. Archibald McLean, 1837-1850 (J. K. B.), 1850-1856 (J. C. P.), 1856-1862 (again J. Q. B.), 1862-1863 (C. J. Q. B.), 1863-1865 (Prest. E. & A.), who had been long a member and twice Speaker of the House of Assembly, was then a strong Tory and gave his whole-hearted support to the policy of the Attorney General John Beverley Robinson. Jonas Jones, 1837-1848, was also a member of the House, a still stronger Tory and much more virulent than McLean. Christopher Alexander Hagerman, 1840-1847, had been successively Solicitor General and Attorney General; in the House he had been the protagonist of rule by Executive Council, denial of Representative Government, donation of the Clergy Reserves to one favoured church, and of conservative measures generally. It is said of him that he was so much of a Tory that he would not

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"There has been only one other instance of amoval of a judge of a Superior Court in Upper Canada (Ontario)—that of Mr. Justice Thorpe in 1807. Other troubles of Mr. Justice Willis may be seen in the report of *Willis v. Bernard*, 5 C. & P. 342; 8 Bing. 376. His wife, left behind in Canada, consoled herself with Lieutenant Bernard; and the injured husband brought a successful action of crim. con."

See my articles, "The Court of King's Bench, 1824-1827," 49 *Can. Law Jour.* 45, 98, 126, 209 (1913).

An incident in the Court of King's Bench in England exhibits Thorpe in a more favorable light:

"The King vs. Francis Gore Esq., 1820.

This was an indictment against Francis Gore, late Lieutenant Governor of Upper Canada, for publishing a libel affecting the character of Judge Thorpe. On motion of Mr. Scarlett, the defendant was brought up for judgment.

The evidence of publication was the fact of the defendant, having submitted the libellous pamphlet in question, to the perusal of Mr. Sergeant Firth, then Attorney General of Upper Canada for his official consideration. The Solicitor General said he understood the case was to go before the Master, in consequence of the affidavits, which the defendant agreed to file. These affidavits stated that the defendant, in submitting the pamphlet to Mr. Sergeant Firth, did so solely in order to consult him officially as a public officer touching the matters it contained; that he had no intention of circulating the libel; that he was not the author of it; that he had no intention of injuring the character of the prosecutor; and that he had not in any manner given his sanction or authority to any publication, prejudicial to the reputation of that gentleman.

Mr. Scarlett, after communicating with his client, announced that the latter was perfectly satisfied with the defendant's declaration, and wished it understood that he had never entertained the slightest personal ill-will towards the defendant.

The defendant was consequently dismissed."

(Quebec Gazette, 3 April, 1820.)



allow himself to be called a Conservative, but a *Tory out and out*, and he undoubtedly lived up to his appellation. None of these when on the Bench interfered in political matters; and no one but extreme partisans has ever seriously charged any of them with partiality arising from political creed or alignment.<sup>69</sup>

WILLIAM RENWICK RIDDELL.\*

TORONTO.

\*Justice of the Supreme Court of Ontario.

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<sup>69</sup> I have gone over the names of all the Judges of the three Superior Courts and of their successor, the Supreme Court of this Province, who have passed over; and I find only very few who had not taken a prominent part in politics before their elevation to the Bench; Sir John Hawkins Hagarty, John Douglas Armour, Sir John Alexander Boyd, Vice-Chancellor James C. P. Esten are perhaps the best known.

# MINNESOTA LAW REVIEW



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# MINNESOTA LAW REVIEW

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## LABOR LEGISLATION IN CANADA

BY WILLIAM RENWICK RIDDELL\*

THE economical problems of Canada are not different from those of the United States except in unimportant minutiae; and the answers attempted in the one country may not be without interest in the other.

In these papers some account will be given of the legislation in Canada in the matter of labor, strikes, and the like.<sup>1</sup>

The earliest legislation of the Dominion followed somewhat closely the existing legislation in England. The Imperial Parliament in 1896 passed an act<sup>2</sup> of which the principle as stated by its proposer was "to endeavor to establish a system of settling disputes between employers and employed, by conciliation."<sup>3</sup> It

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<sup>1</sup>There is no pretence at originality in these papers; nearly all of the materials for them will be found in an article by Mr. F. A. Acland, Deputy Minister of Labour, in 36 Canadian Law Times, 207 sqq; the Annual Reports of the Department of Labour, 1906-7, 1907-8, 1918-19; the Labour Gazette, especially for April, 1916; Report on Strikes and Lockouts in Canada 1901-16, and the statutes referred to in the text. Those desiring a more detailed knowledge of the subject are invited to make use of the above official publications.

<sup>2</sup>(1896) 59, 60 Vict. C. 30, (Imp.) assented to August 7, 1896.

<sup>3</sup>The Right Honorable Charles Thomson Ritchie (afterwards Baron Ritchie of Dundee); the language was employed on Ritchie's moving the second reading of the bill, June 30, 1896. See Parl. Deb. Ho. Com. 1896, 42 Hans. 4th Series, 6th Volume p. 419. Ritchie was at the time president of the local government board; a rather inadequate account is given in vol. 3 of the Second Supplement Dict. Nat. Biog. p. 205; but a full account may be read in Hansard for 1896, 6th, 7th and 8th volumes. The debate on this bill is one of the most extended, animated and interesting in the many volumes of Hansard; but I cannot give even an outline here. The board of trade was and is a department of the government and has no analogy with the unofficial boards of trade in the cities and towns of this continent.

was recognized that there had been for some time in Oldham and elsewhere a fairly satisfactory system of dealing with disputes between employers and their workmen by boards of conciliation: the bill was not intended to interfere with that practice but rather to give the boards of conciliation an opportunity to establish themselves on a better basis by means of registration at the official board of trade. The act also provides that the board of trade might enquire into the causes and circumstances of any dispute between employers and workmen, assist in amicable settlement, at the request of the parties, appoint an arbitrator, etc.

These boards did much good: the intervention of the board of trade was sometimes very useful, but the act did not put an end to all industrial disputes.

However, the experience in England seemed to show that some such legislation was valuable; and in 1900 the existing government of Canada determined to introduce a similar bill in the Canadian Parliament. Mr. (now Sir William) Mulock, then Postmaster General in Sir Wilfred Laurier's administration, accordingly introduced a bill with the object

"by the aid of boards of conciliation to promote the settlement of trade disputes and differences that arise from time to time between employers and employed, and between different kinds of employees."

It was

"hoped that the application of this principle might prevent strikes and lockouts and that if unfortunately such extreme measures should be resorted to in the case of such disputes, the adoption of this method might bring about a more satisfactory and permanent settlement of these disputes."<sup>4</sup>

The act passed<sup>5</sup> was based on the Imperial Act of 1896; but in some respects went further. Like the Imperial Act it provided for the registration of boards of conciliation either before or after the passing of the act, a report of the proceedings of each board to the government,<sup>6</sup> investigation by the minister into trade disputes, etc. The Canadian act also provided for the establishment of a department of labour and the publication every month of a

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<sup>4</sup> This language is to be found in 53 Com. Debates, Canada, (1900) p. 8399. For the debate see pp. 9368, 9392, 9396, 8418-22; 10413.

<sup>5</sup> (1900) 63, 64 Vict. C. 24 (Dom.).

<sup>6</sup> In England to the board of trade; Canada having no board of trade the reports were to be made to the minister assigned for the purpose of carrying out the provisions of the act—a "minister of labour."

Labour Gazette devoted to information concerning conditions of the labor market and kindred subjects, which was to be widely distributed.

So far as the main object of the act was concerned i.e. the establishment of boards of conciliation, the act was a dead letter; but a minister of labour was appointed and a deputy minister:<sup>7</sup> the Labour Gazette was duly published and much useful information obtained and published.

The deputy minister was very successful in arranging settlements between employers and employed; but in the absence of any power of compulsion, however gentle and conditional, it cannot be said that the act was wholly satisfactory. Nevertheless the Prime Minister, Sir Wilfred Laurier, was able to say with truth that "certainly Canada has escaped many such labour disputes as have endangered society in other countries."

In the two years, 1901 and 1902, there were (including a strike of 5,000 Canadian Pacific Railway trackmen) altogether 225 disputes involving some 40,000 employees, about three-fourths of one per cent of the population; but it must be remembered that 1900 and 1901 were times of industrial crisis and 1902 was a year of somewhat diminished industrial activity immediately preceding the era of increased employment and increased wages.<sup>8</sup> In 1903 was passed our first act looking to compulsion in trade disputes. This was the "Railway Labour Disputes Act"<sup>9</sup> which gave the minister of labour absolute power in case of a difference between railway employers and railway employees whether upon application of either party or by a municipality affected or of his own motion to establish a committee of conciliation, mediation and investigation to be composed of three persons, one appointed by the employer, one by the employed, and the third by the parties or if they did not agree, by the two so named—if any party refused to appoint the minister might do so.<sup>10</sup>

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<sup>7</sup> Mr. Mulock became Minister of Labour and Mr. W. I. MacKenzie King (afterwards Minister of Labour and now leader of the Opposition) Deputy Minister.

<sup>8</sup> See "Report on Strikes and Lockouts in Canada, 1901-1916" published by the department of labour, Ottawa, 1918, pp. 10, 11. The language of Sir Wilfrid Laurier quoted above is found 78 Com. Deb. Can. p. 1040.

<sup>9</sup> (1903), 3 Edw. VII, C. 55 (Dom.).

<sup>10</sup> When the dispute was with the Intercolonial Railway or the Prince Edward Island Railway which were owned and operated by the government of Canada, the lieutenant-governor of Quebec, New Brunswick, Nova Scotia or Prince Edward Island was to perform the



The committee was to endeavour by conciliation and mediation to bring about an amicable settlement and if acceptable to both parties to act as a board of arbitration. If the committee failed in its efforts at conciliation and either party objected to its acting as a board of arbitration, new representatives were to be appointed in the same way as the original board, but as a board of arbitration. Upon an arbitration the board had the power of compelling the attendance and evidence of witnesses, etc., as in a court of justice: the award was filed with the minister and published by him in the Labour Gazette—but no court was to have the power to enforce or even to receive in evidence the award; the arbitration was compulsory but obedience to the award was voluntary—the whole matter being left to the good sense of the parties and the force of public opinion. Nor was there any prohibition of strikes or lockouts before, during or after the arbitration.

Only one case came up for action under this act.<sup>11</sup> There is no means of determining whether it had indirect influence in preventing disputes or in inducing the disputing parties to settle their disputes amicably.

The year 1903 was prominent as one of industrial unrest, not so much perhaps in the number of disputes—there were 146 as compared with 104 in 1901 and 121 in 1902—but in the number of employees involved and the heavy time loss:<sup>12</sup> 1904 and 1905 were years of comparative calm—99 disputes in 1904 and 89 in 1905, both together involving not appreciably more than one-half of one per cent of the total population. Official reports show that in the year 1901-1906 out of 722 disputes, 24 were settled by arbitration, 37 by conciliation, and 350 were terminated by negotiation between the parties. In 1906 out of the total number 139 or 141 (according to the dates taken) 50 terminated

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function of the minister in naming a member of the board committee on default. See secs. 3, 7, of the act. Mr. Acland is in error in his article in 36 Can. L. Times at p. 211 in saying: "If . . . the establishment of a board was not requested no board could be established. . . ." the act by sec. 5 expressly provides that the minister might establish a board "of his own motion."

<sup>11</sup> The telegraphers of the Grand Trunk Railway threatened a strike: they asked for a minimum wage, the company refused; arbitrators were appointed who made an award and subsequently the company settled according to the terms of the award. See 78 Com. Deb. Can. pp. 1038, 1039.

<sup>12</sup> There were many strikes in the building trades; 3,000 were out in Toronto alone and there was a strike of 5,000 shoe workers in Quebec.

in favor of the employers and 41 in favor of the employees, 23 compromises, 5 gave the strikers partial success, some employers only yielding—15 strikes ceased without any definite result, the cause being removed or the workmen seeking other employment, and 5 were not settled by the end of the year: 55 were settled by negotiation between the parties, 27 by "strike breakers," 19 by simply resuming work, 5 by conciliation.

In 1906 the two acts above mentioned were consolidated into one without material change:<sup>13</sup> in this year and part of the next there were business expansion and advancing wages. The usual result followed, an increase in labor disputes, 141 in 1906 and 149 in 1907 in all involving almost one per cent of the population.

Thus far there was nothing preventing strikes or lockouts but rather a benevolent supervision by the department of labour with more or less success in preventing, alleviating or terminating labor troubles according to the acuteness or importance of the dispute and the reasonableness of the disputing parties.

In 1907 a radical change was made in the policy of Canada in that respect. Sir William Mulock had ceased to be minister of labour<sup>14</sup> and had been succeeded by M. Rodolphe Lemieux. Mr. King continued to be deputy minister of labour; Mr. King had made a protracted and thorough investigation of the coal strike at Lethbridge and had been forcibly impressed with the necessity of protecting the public against deprivation of this foremost necessity "upon which not only a great part of the manufacturing and transportation industries but also, as recent experience has shewn, much of happiness and life itself depends" so far as that could be done "without encroaching upon the recognized rights of employers and employees." Mr. King made a report advising that in case of a dispute in respect of coal mine employers and employed all questions in dispute might be referred to a board empowered to conduct an investigation under oath with the additional feature, perhaps, that such reference should not be optional but obligatory; and pending the investigation and until the board has issued its finding the parties be

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<sup>13</sup> Can. R. S. c. (1906) C. 96. The figures just above are taken from the Department of Labour Report for 1906-7, and from M. Lemieux's speech in the House of Commons, 78 Com. Deb. Can. p. 1167.

<sup>14</sup> He was in 1905 appointed Chief Justice of the exchequer of the Supreme Court of Ontario, a position he still holds with credit to himself and advantage to his country.

restrained on pain of penalty from lockout or strike."<sup>15</sup> Accordingly a bill was drawn up to cover not only coal mines but other "public utilities and services."

The bill was slightly modified in its passage through Parliament but ultimately was passed and was assented to March 22, 1907,<sup>16</sup> under the name "The Industrial Disputes Investigation Act, 1907."

This act applies to all employers<sup>17</sup> employing ten or more persons and

"Owning or operating any mining property, agency of transportation or communication or public service utility except as hereinafter provided, railways . . . steamships, telegraph and telephone lines, gas, electric light, water and power works."<sup>18</sup>

It provides by section 5 for the appointment by the minister of labour of a board of conciliation and investigation on the application of either party wherever any dispute exists between the employer and the employed and the parties are unable to agree: the disputes to be referred to this board subject to the exception that railway disputes are to be referred under the act of 1906. The board consists of three members who are appointed by the minister, one on the recommendation of each party, and the third on the recommendation of these two: the board has the power to compel the attendance of witnesses, take their evidence upon oath, etc., and has full clerical and other assistance. The first duty of the board is to endeavor to bring about a settlement of the dispute: it must to this end expeditiously and carefully enquire into the dispute and all matters affecting the merits, etc. If the parties agree, a memorandum of agreement is drawn up by the board and signed by the parties: if not, the board makes a full report to the minister in plain terms and without technicalities with its recommendations: the report (or reports if the

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<sup>15</sup> See this Report cited by M. Lemieux on moving for leave to introduce Bill No. 36, in the House of Commons, December 17, 1906; 78 Com. Deb. Canada, p. 1036.

<sup>16</sup> (1907) 6, 7, Edw. VII, C. 20, (Dom.). The very instructive and interesting debate will be found, 78 Com. Deb. Can. pp. 1035, 1150, with a fairly accurate statement by Mr. (now Sir) Robert Borden of the strikes in 1901, 1902, 1903, and of the provisions of the New Zealand Act, 1378 sqq. 79 Com. Deb. Can. pp. 3001, 3091, 3278, 3802, 3843 sqq.; 80 Com. Deb. Can. pp. 3978, 4458, 4771, 4978, sqq.

<sup>17</sup> This is extended by the amending Act of 1920, assented to June 16 (1920) 10, 11, Geo. V. C. 29, (Dom.), to "any number of such persons . . . acting together or who in the opinion of the minister have interests in common."

<sup>18</sup> Sec. 2 (C).



members do not agree) the minister publishes in the Labour Gazette and gives a copy to each of the parties and to every newspaper which applies for it.

Before the report is made either party may agree in writing to abide by it, and this agreement is also sent in.

Another provision of much value is to be found in section 63—when there is a dispute arising in any industry or trade other than those included in the act and the dispute threatens to result or has resulted, in a strike or lockout<sup>19</sup> either party may agree in writing to allow the dispute to be referred to a board of conciliation and investigation under the act: this is transmitted by the registrar, an official at Ottawa, to the other party and if he also agree, the dispute is referred “as if the industry or trade and the parties were included within the provisions of the act.” As soon as the registrar informs the parties that the minister has decided to refer the dispute “the lockout or strike in existence is forthwith to cease.”

The teeth of the act lie in section 56 which provides that (with certain limited exceptions not of interest in this inquiry) “it shall be unlawful for any employer to declare or cause a lockout or for any employee to go on strike on account of any dispute prior to or during a reference of such dispute to a board of conciliation and investigation under the provisions of the act or prior to or during a reference under the provisions concerning railway disputes in the conciliation and labour act” of 1906. Any employer who violates this prohibition is liable to a fine of not less than \$100 or more than \$1,000 for each day or part of a day the lockout continues: an employee to a fine of not less than \$10 or more than \$50 for each day or part of a day: anyone inciting, encouraging or aiding an unlawful strike or lockout is liable to a fine of not less than \$50 or more than \$1,000. These penalties are recovered by summary proceedings before justices of the peace.

The act calls for observation in the following particulars: 1. Only industries which are concerned with what may fairly be called “public utilities” are compulsorily affected by the act; 2. Other industries may by consent come under it; 3. The minister of labour is authorized to act only upon request of a party—thus taking away the discretion given him by the act of 1900; 4. The

<sup>19</sup> Extended by act mentioned in Note 17 *supra* to a case where a strike or lockout “seems to the minister to be imminent.”

minister may refuse to grant a board;<sup>20</sup> 5. Railway disputes are disposed of under the act of 1906; 6. Strikes and lockouts are forbidden until after a report of the board: but not thereafter.

Of the 151 trade disputes reported in 1907, 16 occurred in the first three months of the year before the passing of the act, and the act did not become well known until some time after it was passed. Of the remaining 135 disputes 60 were settled by negotiation, 22 by replacement of strikers, 23 by resumption of work on employers' terms, 2 by granting of employees' demands, in 3 work was resumed as employers were not involved in the dispute: in 4 strikers found employment elsewhere, there were 3 cases of arbitration and 6 of conciliation—leaving 12 unsettled (or unknown).<sup>21</sup> During the year there were 25 applications for boards of conciliation and investigation, but three disputes were settled before a board was constituted and one when the board was being constituted—in only one case did the board fail to prevent a strike, while there were 22 cases in mines and public utilities where a board was not called for.<sup>22</sup>

A full and itemized statement of strikes and lockouts in after years can be obtained from the publications of the minister of labour at Ottawa: but it would seem to be unnecessary here to do more than set out a summary and the following will probably be found sufficient:

Of cases coming within the act of 1907 whether as affecting "public utilities" and the like or by reason of request by one party and consent of the other during the period March 22, 1907, to March 31, 1919, there were 374 disputes referred under the act,

<sup>20</sup> This is made clear by the amending act, (1918) 8, 9, Geo. V. c. 27 (Dom.) amending s. 6 of the Act of 1907.

<sup>21</sup> Report of the Department of Labour for 1907-8 p. 177. Perhaps it may be of interest to set out the causes of the strikes up to this time:

Causes	1901	1902	1903	1904	1905	1906	1907	Total
For increased wages .....	48	54	60	36	30	55	65	348
Against reduction .....	10	7	7	7	8	3	3	45
For decreased hours .....	1	7	8	3	3	7	11	40
Increased wages and decreased hours .....	5	14	18	8	4	7	8	64
Against employment of certain men .....	13	8	13	16	9	13	20	92
Against conditions .....		5	5	4	8	3	5	30
Recognition union .....		5	5	1	4	5	3	23
Sympathetic .....			29	10	3	1	2	47
Unclassified .....	16	12	29	21	23	43	29	173
Totals .....	93	121	155	102	87	138	146	842

<sup>22</sup> Report of Strikes and Lockouts in Canada 1901-1916, p. 13.

of which 67 were in mines, 217 transportation and communication, 9 public utilities proper, i.e. light and power, etc., 30 in war work, and 51 which were referred under request of one party and consent of the other—in these 374 references there were 24 failures to prevent or end strikes, 11, 11, 0, 1 and 1 in the classes above named.<sup>23</sup>

In the last year of which full itemized particulars are available in printed form, i.e. from April 1, 1918, to March 31, 1919, the numbers referred total and in classes were 100, 3, 44, 4, 24, 25, and the failures 2, 0, 1, 0, 1, 0.<sup>24</sup>

In addition to the act of 1907 it must be borne in mind, the act of 1906 has been in full force. Officers of the department of labour are stationed at Vancouver, Calgary, Winnipeg, Toronto, Ottawa, and Montreal—it has been not only the duty but the pleasure of these officers to get specially in touch with all industrial disputes, and to tender their good offices to prevent and adjust strikes and lockouts. "An ounce of prevention is worth a pound of cure:" and it is quite certain that in the great majority of cases of growing dispute which came to the attention of the department, the trouble was settled without a strike. Moreover, it is officially stated that

"There is a growing tendency on the part of employers as well as workmen to invite the services of a departmental officer before a break in working relations. Experience is of the highest value in conciliation work, and many a dispute which has perplexed and baffled employers and workmen alike is solved by the appearance at an opportune moment of an officer who has frequently encountered the same or similar situations, and whom both sides (though not always without hesitation on the part of one party or the other) accept as mediator."<sup>25</sup>

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<sup>23</sup> Report of Department of Labour for the fiscal year ending March 31, 1919, Ottawa, 1920, p. 75.

<sup>24</sup> *Ibid.* p. 74.

<sup>25</sup> *Ibid.* p. 8. The language quoted is that of Mr. Acland, Deputy Minister of Labour, in his report to Hon. Senator Robertson, Minister of Labour, (himself a labor man and in a sense representing labor in the Dominion Cabinet). I do not here more than mention the Order-in-Council, P. C. 1743, which set out explicitly the conditions which in the view of the government should obtain in Canada during the war; it amongst other things established a board of appeal to which appeals could be carried from boards of conciliation, the board of appeal being composed of two representatives of labor nominated by the executive council of the trades and labour congress of Canada, two representatives of the employers nominated by the executive of the Canadian manufacturers' association and a chairman selected by these four or if they could not agree by the minister of labour. This came to an end on peace—for Canada unlike the United States is now at peace.



It would be ungenerous not to say a good word of the splendid disposition shown by employer and workman during the recent war. Canada was at war in August, 1914, and for some years while the United States was still unengaged, was suffering fearful losses. In 1911 the loss of time by strikes was over two million working days—in 1912, about one million, and in 1913, a million and a quarter, but in 1914 less than half a million with a total number of strikes 44, the smallest number in the experience of the department since its organization in 1901. In 1915 there were 43 strikes with a time loss of 106,149 days, one-twentieth of the loss in 1911: in 1916 the loss was slightly increased, 43 strikes causing a loss of about 200,000 days: 1917 was not quite so satisfactory. In this year labor shortage first became felt and there was a growing demand on the munition factories: shipbuilding became active, and the miners in the west were restive. But with all this the strikes totalling 148 brought about a loss of only 1,134,790 days, less than half the loss of 1911, a year of similar unrest. In 1918 there were more strikes, but these were of short duration, 196 strikes producing a loss of 763,341 days—41 of the strikes lasted three days or less, and in many other cases work was resumed within a week or ten days.<sup>26</sup>

In Canada we are not embarrassed by troublesome "constitutional limitations." Our Parliament within the ambit of its prescribed objects has plenary power to act as it will.

The Conciliation Act of 1906, section 30, provides that:

"No court . . . shall have . . . any power . . . to recognize or to receive in evidence any report of any board of arbitration or of any committee of conciliation or any testimony or proceedings before such board or committee . . . for any purpose whatever except in case of prosecution for perjury;" and all such boards may allow or decline to allow professional counsel or solicitors to appear although the parties may appear in person or by agent.<sup>27</sup> The boards may in their discretion conduct their proceedings in public or in private, Sec. 33.

Under the act of 1907, the board sits in public unless it decides to sit in private:<sup>28</sup> it may permit or refuse counsel or solicitors, Sec. 41, and its proceedings have the same immunity from court interference as in the act of 1906.

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<sup>26</sup> See the very lucid and interesting report mentioned in note 25 *supra*.

<sup>27</sup> Sec. 29.

<sup>28</sup> Sec. 45.

Consequently there is little in the way of judicial proceedings in connection with these acts.

There have been a very few proceedings against workmen for striking before a board has been asked for.<sup>29</sup> These were generally due to ignorance of the law, and in at least one case to my personal knowledge the workmen on finding that they were acting illegally called off the strike only to renew it when the award of the board was not satisfactory to them.<sup>30</sup>

In *Rex v. McGuire*, one James McGuire<sup>31</sup> was convicted by the police magistrate of Cobalt of "having unlawfully incited the employees of the Nipissing Mining Company to strike," and adjudged to pay a fine of \$500 and in default of payment to be imprisoned for six months. A motion was made to the supreme court to quash the conviction on several grounds, the chief one being that neither party had made an application for a board. The divisional court<sup>32</sup> held that the prohibition by the act of strike or lockout "prior to and during a reference" applied not only to cases in which either party had applied for a board but to all cases: and consequently a strike is illegal before as well as after such application.

The legislation to ensure workmen fair wages and decent surroundings and to secure them against undue competition from labor imported under a contract, and also the effect of Canadian legislation upon that of other countries will be the subject of another paper.

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<sup>29</sup> Published in the Labour Gazette.

<sup>30</sup> The strike in the Springhill coal mines, Nova Scotia, which resulted so disastrously to both owners (*crede experto*) and the workmen.

<sup>31</sup> (1908) 16 O. L. R. 522, 11 O. W. R. 384.

<sup>32</sup> Composed of Sir William Mulock, C. J. Ex., Magee and Clute, J. J.; the judgment is illuminating and will well repay careful perusal. The prosecution was under sec. 60 of the act: "Any person who incites, encourages or aids in any manner any employee to declare or continue a lockout or any employee to go or continue on strike contrary to the provisions of this act, shall be guilty of an offence and liable to a fine of not less than \$50 nor more than \$1,000."

The term of imprisonment was reduced to three months by the Divisional Court.

## ACCEPTANCE OF OFFERS FOR UNILATERAL CONTRACTS BY PARTIAL PERFORMANCE OF SERVICE REQUESTED

BY HENRY W. BALLANTINE.\*

ONE of the most interesting conundrums in the elementary theory of contract law relates to the revocability of proposals which call for acts requiring time for completion, once performance has been entered upon by the offeree. Does part performance bind the offeror? May the offeror still revoke his offer, and will it lapse in case of his death before completion?

Take the following case as raising the issues involved. A by writing purports to give B the exclusive sale on certain terms for three months from date, of Blackacre owned by A, and promises to pay him a commission of five per cent in case he procures a purchaser, or in case A finds a purchaser himself. B proceeds to perform services in pursuance of this authorization by listing and advertising the property and endeavoring to sell it. Thereafter A personally sells and conveys the property, but refuses to pay B a commission. He contends that the writing is on its face *unilateral*, and that it contains no engagement or promise on B's part to do any act, and hence is not binding on either party.

The case of *Stensgaard v. Smith*<sup>1</sup> seems to hold that the broker would have no claim under such an authorization. But *Lapham v. Flint*<sup>2</sup> in effect overrules the earlier case, and holds that the offer of a unilateral contract may be accepted by the agent's partial performance and that the owner is liable. The court purports to distinguish the *Stensgaard* case but on untenable grounds. That case might perhaps have been distinguished on the construction of the writing, in that it called for an *agreement* or promise to act as agent for sale on the part of Stensgaard, and there was no showing of notification to defendant that he had undertaken to sell the land.<sup>3</sup> The court, however, construed the

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\*Professor of Law, University of Minnesota.<sup>1</sup> (1890) 43 Minn. 11, 44 N. W. 660.<sup>2</sup> (1902) 86 Minn. 376, 90 N. W. 788.<sup>3</sup> *White v. Corlies*, (1871) 26 N. Y. 467.



# MINNESOTA LAW REVIEW



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## LABOR LEGISLATION IN CANADA:

### IMPORTATION OF LABOR.

BY WILLIAM RENWICK RIDDELL\*

LEGISLATION in the Dominion Parliament to protect Canadian workmen from undue competition from imported labor began in 1897.<sup>1</sup> The first bill for the purpose which resulted in action was introduced by a private member of the House of Commons, Mr. Cowan, who came from Windsor, Ontario, opposite Detroit. He spoke of the legislation in the United States respecting the employment of aliens there, pointed out that it had the effect of restricting Canadian laborers and artisans in obtaining employment across the lines and gave instances where it had

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\* Justice of the Supreme Court of Ontario, Toronto, Can.

<sup>1</sup> The question had been discussed several times in the House. Mr. Taylor, a private member, i. e. not a member of the government, being perhaps the most active proponent. His bill was introduced March 29, 1887, 44 Com. Deb. Can. p. 89, immediately after that of Mr. Cowan, do. do. p. 88. Other bills had been introduced previously but had failed to pass. The Reform Party under Sir Wilfred Laurier was in power at the time having succeeded at the general election of 1896 after an exclusion from power for 18 years. The government was watching its steps with great caution; it had not taken a definite stand in the matter and there was a somewhat amusing race between Mr. Cowan a reformer and supporter of the government on the one side of the House and Mr. Taylor a conservative and consequently on the opposition side of the House, for the favor of the Labor Unions and priority in their respective bills. The reformer naturally won by a nose: "Codlin is the friend, not Short." In our system of responsible government, the administration must at all times be in a position to procure a majority vote of the House of Commons on any measures. Moreover, the whole ministry must assume responsibility for every act of each minister. Accordingly a government must carefully consider every proposed measure before accepting it as a government measure. Where the government does not assume responsibility, a measure may be introduced by a "private member." If the government is neutral it takes its chances of passing, if the government actively



operated very harshly. He thought that Canadian laborers and artisans did not need and did not wish protection<sup>2</sup> in the open field of competition, "fair field and no favour:" but that it was a matter of national self-respect that they should be protected in the home market against the labor of a country which debarred them from competition there.<sup>3</sup> The bill was referred to a committee together with a bill to much the same effect introduced by Mr. Taylor.<sup>4</sup> The bills were consolidated in committee<sup>5</sup> and finally the consolidated bill became law.<sup>6</sup>

The act is much like the American statutes: it forbids assisting immigration of foreigners under contract to perform labor in Canada and voids every such contract: a penalty of \$1000 is

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opposes, it is defeated. In the case of protection to workmen, the government was neutral.

At the date of this writing the government has not taken its stand on the question whether employees of the national railways, the Canadian National and the Grand Trunk, shall be permitted to take any active part in politics. The president of the Canadian National has put in force a regulation forbidding this: and in the election held in Northeast Toronto, November 8, 1920, Mr. Higgins the Labor candidate was obliged to give up his employment in the Canadian National Railway: he was not elected; The Honorable Senator Robertson, Minister of Labour and himself an employee of the privately owned Canadian Pacific Railway was reported a few days ago to have said that the question would receive the careful consideration of the government and a decision given. In the Winnipeg Tribune of November 10, 1920 appears the following item, indicating that the government has not decided in favor of the employees.

"The recent order of D. B. Hanna prohibiting C. N. R. employees from holding legislative offices, was carried into effect Tuesday, when A. E. Moore, M. L. A., president of the Winnipeg District Command, Great War Veterans' Association was notified that he would have to resign his seat or give up his position.

"As Mr. Moore refused to relinquish his seat, he was forced to leave the employ of the C. N. R."

(M. L. A. means Members of the Legislative Assembly.) The matter has been taken up by the trade unions; but it is still undecided.

<sup>2</sup> Canada was for a long time a free trade country as was to be expected from her enormous production of raw materials. In 1878, the people declared for protection for manufacturers, the "national policy." Since that time almost all classes have at some time demanded protection for themselves, which is also most natural.

<sup>3</sup> 44 Com. Deb. Can. pp. 625 sqq. There was some pretty good talk by Mr. Cowan. "The Canadian Laborer and the Canadian artisan . . . never asked any government to protect them by legislative enactment which declared that his neighbour from a foreign nation must renounce the flag of his country and sever the ties with the home he loved before he could secure the vantage ground in life's broad field of action that leads to final victory." Mr. Taylor spoke on the bill, said he had introduced one in 1890 of which Mr. Cowan had copied eight clauses word for word, etc., etc. He found fault with some of the provisions of Mr. Cowan's bill but generally approved.

<sup>4</sup> 44 Com. Deb. Can. p. 659.

<sup>5</sup> 45 Com. Deb. Can. pp. 3545 sqq. After an ineffectual protest by Mr. Taylor.

<sup>6</sup> (1897) 60, 61 Vict., c. 11 (Dom.)

imposed on every person natural or artificial assisting or encouraging such immigration: the master of a ship who so offends is liable to a fine of \$500 and imprisonment for six months. The attorney general of Canada may deport within one year anyone so immigrating and at the expense of the owner of the importing vessel: and no proceedings were to be taken under the act without the consent of the attorney general. The act was in its terms a retaliatory act. It provided by Sec. 9 that it "should apply only to such foreign countries as have enacted and retained in force or shall enact and retain in force laws or ordinances applying to Canada of a character similar to this act." After a slight amendment in 1898, relating only to evidence of foreign law,<sup>7</sup> this act remained in force until 1901. When the department of labour was created in 1900,<sup>8</sup> it became a very important part of its duty to gather information and inform the attorney general's department of violations of the act. A resident officer was appointed with that special duty.

There were many prosecutions under this act but it was found cumbrous in its actual working. The department of the attorney general was in Ottawa and complaints were made that there were delays and obstacles in the way of speedy and effectual prosecution. Moreover, the courts were conservative in imposing the very severe penalty of \$1000 and cases arose where a much smaller penalty might well be sufficient punishment. The most serious defect, however, arose from the fact that the act was frankly retaliatory on the United States as it was to apply only to aliens or foreigners, citizens of countries having similar legislation. Accordingly where proceedings were taken in respect to workmen from the United States, all that had to be proved for a successful defence was that the workmen were not citizens of the United States.

These defects induced the government to promote legislation. It had now become the settled policy of the government. Accordingly, March 7, 1901, the Prime Minister Sir Wilfred Laurier introduced a bill to amend the act correcting these defects.<sup>9</sup> This bill was much discussed in labor circles and contained a clause inserted at the suggestion of the labor organizations forbidding promise of employment to foreigners by advertisement and the like. The bill was passed in due course and became law May 22,

<sup>7</sup> (1898) 61 Vict. c. 2 (Dom.)

<sup>8</sup> Under the Conciliation Act, 1900, 63, 64 Vict. c. 24 (Dom.)

<sup>9</sup> 54 Com. Deb. Can. (1901) p. 1066.

1901.<sup>10</sup> The law thus declared has been consolidated in the Revised Statutes of Canada, 1906, as chapter 97. The penalty for assisting alien labor to enter Canada under contract is not less than \$50 or more than \$1000; this may be sued for as a debt by any person on the written consent of the judge of the court in which the action is to be brought. Or on the consent of the attorney general of the province, the penalty may be imposed on a prosecution and summary conviction under the criminal law and the minister of finance may allow up to 50 per cent of the amount recovered to the original informer. As in the earlier act contracts are declared void which have as their object the violation of the act. The master of a vessel knowingly bringing in alien labor under contract is liable to a fine of not more than \$500 for each person and also to imprisonment for not more than six months. If an immigrant comes to Canada in violation of the act, he may within the year be deported to the country whence he came at the expense of the owner of the vessel or if from "an adjoining country"<sup>11</sup> at the expense of the person or company that brought him or lured him to Canada. It is considered a violation of the act for anyone to assist or encourage immigration from any other country by advertisement, etc., of promise of employment and the like. The whole act is still restricted in its application to countries having similar legislation.

The first case reported under this act was in British Columbia: W. L. MacDonald of the miner's union at Rossland, British Columbia, laid an information against Albert Geiser for bringing from the United States two miners, Stevenson and Andrew, under contract to work in the Le Roi mine: Geiser was convicted and fined \$500 in one case and \$50 in the other. Failing on technical grounds to have an appeal considered,<sup>12</sup> he paid the fines and \$275 was awarded to MacDonald. It is not proposed to detail the cases decided under the act. It will be sufficient to note a few with the points decided.

In 1902, the carpet weavers' union laid an information against the secretary-treasurer of the Toronto Carpet Company. He had engaged in Lowell, Massachusetts, for his factory in Toronto, a French Canadian who asked that his brother should also be engaged. The answer was "He will have a show." They came

<sup>10</sup> As (1901) 1 Edw. VII, c. 13.

<sup>11</sup> A gentle way of saying "the United States."

<sup>12</sup> See *Rex v. Geiser*, (1901) 5 Can. Cr. Ca. 154; (1903) 7 Can. Cr. Ca., 172; 4 *Labour Gazette*, (August 1903) p. 143.



and went to work. As to the first man, he was a British subject, never denaturalized, and there was, therefore, no offence. As to the brother, it was held that an express contract was not necessary, and a fine of \$50 and costs was imposed.<sup>13</sup>

In 1904, an information was laid against a tailor in Dundas for importing two workmen from New York. His defence was that he did not make a direct engagement but 'only assured them of work in his factory: that defence was unsuccessful.<sup>14</sup>

A defence that a strike had left him shorthanded, that he could not get corkcutters in Canada and did not know the law did not save Edward Freyseng of Toronto.<sup>15</sup>

A man in Philadelphia saw an advertisement which caused him to write for work to a wallpaper company in Toronto: the president answered that he could not engage him in the United States but could if he came to Toronto. On being requested to pay railway fare, the president refused as that would be a violation of the act, but sent a ticket from the Canadian border to Toronto. Fine \$50 and costs of which the informer got \$25.<sup>16</sup> But while the courts have been astute to prevent colorable evasion of the act, its provisions have not been extended beyond their fair meaning. The usual manufacturer's advertisement of "mechanics wanted" was held to be simply an invitation to apply for employment, not a promise of employment:<sup>17</sup> and the consent of the judge to bring an action must specify the offence charged and not simply the alleged offender.<sup>18</sup>

Very important investigations have been made by commissioners appointed for the purpose into the employment of aliens

<sup>13</sup> *Rex v. Hayes*, 3 *Labour Gazette* (September 1902) p. 188, 23 C. L. T. 88.

<sup>14</sup> *Rex v. Amberg*, 5 Ont. L. R. 198, 20 W. R. 123, 6 Can. Cr. Cas. 357. 5 *Labour Gazette* (September 1904) p. 303.

<sup>15</sup> *Rex v. Freyseng*, 4 *Labour Gazette* (May 1904) p. 1129.

<sup>16</sup> *Rex v. Menzie*, 6 *Labour Gazette* (March 1906) p. 1059; 6 *Labour Gazette* (November 1906) p. 580.

<sup>17</sup> *Rex v. Vancouver Engineering Works*, 5 *Labour Gazette* (July, 1904) pp. 112, 113; S. C. 8 Can. Cr. Ca. 66. See the sound and commonsense remarks of Mr. Justice Duff.

<sup>18</sup> *Rex v. Breckenridge*, 6 *Labour Gazette* (1905) pp. 228, 469, 597; S. C. 10 Can. Cr. Ca. 180, 10 Ont. L. R. 459. This was decided at Toronto by a divisional court composed of Sir William Meredith (then C. J. Common Pleas now C. J. Ontario), Anglin J. (now Justice of the Supreme Court of Canada) and Clute J., the judgment of the court being delivered by the chief justice who points out that were it otherwise "the protection which the written consent was intended to give would be wholly illusory and it would be possible to prosecute for an offence entirely different from that brought to the notice of the judge and to which the consent . . . was intended to apply." 10 Ont. L. R. at pp. 461, 462.

upon railways. In the case of the Grand Trunk Railway in 1904, the Commissioner, Judge Winchester of Toronto, reported twenty-four engineers, etc., improperly employed by the company: fifteen left the employment at once and some of the others were deported at the instance of the attorney general. The investigation into the Père Marquette Railway had a curious result: the Commissioner, Judge Winchester, confirmed the conclusions of a labor man who had investigated the facts on the instructions of Sir William Mulock, Minister of Labour. At the request of Sir William, the attorney general of Canada issued warrants for the deportation of the aliens named: some left voluntarily but James R. Gilhula, chief train despatcher and Everett E. Cain, trainmaster at St. Thomas, Ontario, resisted. They obtained a writ of habeas corpus upon the return of which, Mr. Justice Anglin ordered their discharge. The learned judge proceeded upon the ground that there was no means whereby the American employees could be "returned to the United States" without "an assumption of extra-territorial jurisdiction" which Canada admittedly does not possess.<sup>19</sup> This meant a very serious impairment of the act; the attorney general of Canada informed the House of Commons that the government did not agree in Mr. Justice Anglin's law and that an appeal would be taken to the Judicial Committee of the Privy Council, the final tribunal for Canadian cases.

Accordingly the solicitor general of Canada<sup>20</sup> appeared before the Judicial Committee and obtained leave to appeal.

The Judicial Committee reversed the judgment appealed from and thus finally and conclusively declared that the act was *intra vires* the Dominion, i. e., "constitutional" in the American sense of the word.<sup>21</sup>

It may be confidently said that this act is in universal favor among workmen and that only very occasionally does it work real hardship upon the employers.

Imperial legislation was passed in 1906 at the instance of Canada making it an offence punishable with fine and imprison-

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<sup>19</sup> See the report *In re Gilhula*, (1905) 10 Ont. L. R. 469.

<sup>20</sup> The Honorable Rudolphe Lemieux, afterwards, upon Sir William Mulock becoming Chief Justice of the Exchequer Division, Minister of Labour and Postmaster General in succession.

<sup>21</sup> I happened to be in the Judicial Committee, Downing Street, Westminster, waiting for my case to be called and heard the argument July 6 1906. The case is reported, [1906] A. C., 542.

ment for anyone by false representation to induce any person to emigrate or engage a steerage passage in any ship.<sup>22</sup>

Another protection for certain workmen has been on the statute book since 1896,<sup>23</sup> the "Wages Liability Act." This provides that the minister may pay to workmen of any contractor with the government or any subcontractor, their wages out of money coming to the contractor: and provides means for the payment of such wages.

A still more important provision is not statutory but is based upon a unanimous resolution of the House of Commons in March 1900. This resolution was introduced by Sir William Mulock, Minister of Labour, and is to some extent based upon the resolution of the Imperial House of Commons against "sweating," February 13, 1891, which had been found by a select committee of that House in 1897 to be working well. After an animated debate the resolution was unanimously adopted.<sup>24</sup> This in substance provides for the inclusion in every government contract of conditions insuring the workmen fair wages, and this includes not only contracts with the government but also every contract for works assisted by the grant of Dominion funds. Every railroad and some other projects have been assisted by a grant from the Dominion: the wide reacting effect of this provision will accordingly be manifest.<sup>25</sup> The minister of labour appointed fair wage officers whose duty it was to see to it that the proper clauses were inserted in contracts entered into by the different departments of the government: the rates of wages are based upon the rates prevailing in the vicinity: if there is no such prevailing rate, the officer determines the rate on consideration of all the circumstances, the cost of living, etc., etc., in the various localities. Labor men have been selected for that position, and there has been little friction and no serious trouble over the wages.<sup>26</sup> There are at present five officers

<sup>22</sup> (1906) 6 Edw. VII, C. 48, S. 24. (Imp.) See as to this whole matter Report of Department of Labour for 1906-07, pp. 98-105.

<sup>23</sup> (1896) 59 Vict., c. 5 (Dom.) now R. S. C. (1906) c. 98.

<sup>24</sup> 51 Com. Deb. Can. (1900) pp. 2464, sqq. The text of the Resolution is given on p. 2464.

<sup>25</sup> Some if not all of the provinces insist upon a similar clause in their contracts and in all contracts for enterprises with provincial subsidy.

<sup>26</sup> I find that in the seven years from the beginning of the system down to the Report of 1906-7 there were 935 schedules of fair rates prepared by the Fair Wage officers, extending into every province of the Dominion, 147 and 150 being the numbers in the last two years. See Report of Department of Labour for 1906-7, p. 82. In the next year there were 222, 96



engaged in fair wages and conciliation matters.<sup>27</sup> In some instances, the department has had to extend its investigations to procure information; and it is always ready to make investigations and to furnish the fullest particulars to those interested who make application.<sup>28</sup>

The part played by the provinces in labor legislation is important if not quite so striking as that of the Dominion. Taking this province, Ontario, as an example (and the other provinces are not very different), workmen are given a lien on a structure upon which they are working and the land improved by the building priority to judgments, executions, assignments, etc., and a simple process is provided for the recovery of wages.<sup>29</sup> Woodmen in the new districts have a lien on the time cut;<sup>30</sup> wages are a preferred claim in insolvency, on sales under execution, etc.<sup>31</sup> Wages of miners must be paid fortnightly,<sup>32</sup> all wages are exempt from seizure up to \$25.00.<sup>33</sup> Ontario has a statutory provision similar to that of the Dominion for the payment of the wages of workmen on contracts with the province or with provincial aid or subsidy.<sup>34</sup> The same act makes every company with an Ontario charter liable for wages on any work done for the company either directly under the company or through the intervention of a contractor or sub-contractor.<sup>35</sup>

Councils of conciliation and of arbitration are also provided for settling industrial disputes on much the same lines as in the Dominion legislation.<sup>36</sup>

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for the department of public works, 93 railways and canals, 23 marine and fisheries, and 11 militia and defence. Report for 1907-8 p. 136. (On this page will be found the Mulock Resolution of 1900).

<sup>27</sup> See Report of Department of Labour for 1918-19, p. 33 for particulars.

<sup>28</sup> In the Report for 1907-8, p. 127 is given a list of persons for whom investigations were made and to whom information was supplied including Mr. Gompers, Professor Batten of Washington and Lee University, the captain of a high school debating team of Brooklyn, and gentlemen in England, Australia and all parts of Canada. I gratefully recognize the courtesy and consideration of the department of labour to myself on several occasions when I asked for information.

<sup>29</sup> R. S. O. (1914) C. 140.

<sup>30</sup> R. S. O. (1914) C. 141.

<sup>31</sup> R. S. O. (1914) C. 143.

<sup>32</sup> (1916) 6 Geo. V. C. 12, S. 4. (Ont.)

<sup>33</sup> R. S. O. (1914) C. 143, S. 7 (1). By the act R. S. O. (1914) C. 63, S. 66 a minor can sue for wages up to \$100 notwithstanding his minority.

<sup>34</sup> (1910) 10 Edw. VII., C. 71 (Ont.) now R. S. O. (1914) C. 142.

<sup>35</sup> R. S. O. (1914) C. 142, S. 7.

<sup>36</sup> R. S. O. (1914) C. 145. This machinery is very little used. One statute of Nova Scotia should be mentioned: by the act of (1890) 53 Vict., C. 7 (N.S.) providing for arbitrations in coal miners' disputes, the masters

A very important part of the Ontario legislation concerning labor is workmen's compensations for injuries suffered in the course of their employment. Legislation on this subject began in England by the "Employers' Liability Act, 1880."<sup>37</sup> As is well known the most significant of the changes effected by this statute was the practical abolition of the rule in *Priestley v. Fowler*,<sup>38</sup> and it certainly was a great boon to the workmen.

Ontario's first statute on the subject was in 1886, "The Workmen's Compensation for Injuries Act."<sup>39</sup> This was substantially the same as the English act and with various amendments remained law until 1914 and except as affected by the legislation of 1914, still is law. The act of 1914 does not take away the rights given by existing legislation and if the case is not covered by the act of 1914, the injured workman may still proceed against the employer as formerly. Most cases, however, are covered by the recent statute, and if the case be so covered, he must proceed under the statute and not under the former legislation.<sup>40</sup>

The new act provides for the appointment by the lieutenant-governor in council<sup>41</sup> of a commission of three members, the chairman and two others, "The workmen's compensation board." They pass upon claims for compensation for injury or death in the course of a workman's employment. The board sits at Toronto and is kept somewhat busy at all times. The province con-

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are forbidden to reduce wages or declare a lockout if an arbitration is asked for and by C. 8, workmen are forbidden to strike. These acts were amended by (1901) 1 Edw. VII cc. 29 and 30, (N.S.) after having been R. S. N. S. (1900) C. 21.

<sup>37</sup> In Hansard Debates in the House of Commons for 1800 will be found a report of a debate of the most interesting character and most ably conducted by nearly every speaker. The act is (1880) 43, 44 Vict., C. 42. (Imp.)

<sup>38</sup> *Priestley v. Fowler*, (1837) 3 M. & W. 1.

<sup>39</sup> (1886) 49 Vict. c. 28 (Ont.) In our constitution, the province has jurisdiction over "civil rights." The act became R. S. O. (1897) c. 141: it was amended in 1889 by 53 Vict., c. 23 (Ont.): was taken forward as R. S. O. (1897) c. 160 and R. S. O. (1914) c. 146. The act of 1914 is 4 Geo. V, c. 25 (Ont.)

<sup>40</sup> See, e. g., *Murphy v. Toronto*, (1918) 41 Ont. L. R. 156; *S. C. in appeal* (1918) 43 Ont. L. R. 29, 45 D. L. R. 228. *Hutton v. Toronto R. Co.*, (1919) 45 Ont. L. R. 550, 49 D. L. R. 216, 16 O. W. N. 236.

<sup>41</sup> Our camouflage for "the members of the government." The lieutenant governor has nothing to do with the appointments. We call him governor on the *lucus a non lucendo* principle because he does not govern. We have responsible government. i. e., the ministry is responsible for every act not to the governor but to the representatives of the people in the legislative assembly and whenever they cannot command a majority there they must get out and give place to others who can.

tributes for administration not more than \$100,000 a year: and an accident fund is formed from subscriptions from certain specified industries as fixed by the board. Assessments are made annually by the board for the fund.

The act was very carefully drawn after the most extensive and minute inquiry. It operates successfully and to the satisfaction of all concerned.<sup>42</sup>

It is not thought necessary to discuss the provincial legislation for the protection of workmen from undue danger and the like. It is much the same as in all advanced communities.<sup>43</sup>

The Canadian Dominion legislation of 1907 has been followed in other Dominions. The Transvaal, South Africa, in 1919, Queensland, Australia, in 1912, New Zealand in 1913.<sup>44</sup>

In conclusion it may be said that at every step, representative labor men as well as employers have been freely and openly consulted in reference to every piece of legislation; workmen have been kept posted by the Labour Gazette of the working of the acts and all suggestions from any source receive careful consideration. The inner history of the legislation original and amendatory would make interesting reading, but that is another story.

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<sup>42</sup> The investigation was made by Sir William Meredith, Chief Justice of Ontario, who when in the legislative assembly had much to do with the passing of the original act. The bill drawn by him became law and has been a model for legislation elsewhere.

<sup>43</sup> Children are protected by the Mining Act R. S. O. (1914) c. 32 as amended in 1916, 1918, and 1919: the Apprentices and Masters Act, R. S. O. (1914), c. 147: the Factory Act, R. S. O. (1914) c. 229 as amended in 1918 and 1919: the Children's Protection Act R. S. O. (1914) c. 231 as amended in 1919: the School Attendance Act of 1919, 9 Geo. V, c. 77 (Ont.) etc.

Women are protected by the Mining Act, the Factory Act, etc., while there are many statutory provisions looking to the health and safety of all workmen.

<sup>44</sup> See the article by the Deputy Minister of Labour, Mr. F. A. Acland referred to in note 1 of the former paper.



# MINNESOTA LAW REVIEW



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## THE CONSTITUTIONS OF THE UNITED STATES AND CANADA.

### A COMPARISON.

AN American in Canada,<sup>1</sup> a Canadian in the United States feels himself at home; the language is the same, the intonation not very different, the religion the same, business is conducted in the same way, social customs are similar and no one can detect any outward difference in the law except such a difference as can be seen between the laws of the several states or the several provinces.

And yet the courts of Canada are almost wholly relieved of a class of case which flourishes in the United States, with a tropical profusion which now and then clogs and almost threatens to smother any others—a class of case arising out of constitutional limitations.

The reason of this difference is of course historical; no people can get away from their history<sup>2</sup> any more than from their geography. When the thirteen colonies determined to form themselves into a new nation, they cut the painter which bound them to the mother country, and in a measure broke away from English tradition. England had through a course of evolution framed for herself a form of government which answered her needs fairly well: the theory that the rulers, the executive servants of

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<sup>1</sup> I refer to English speaking Canada and Canadians; some parts of the province of Quebec and a few French Canadians are in different case.

<sup>2</sup> Henry Ford is said to consider history as nonsense and its study unnecessary and harmful—perhaps that is so in manufacturing automobiles, but automobiles and laws are not quite the same.



the king, must do the bidding of the people had been established by the revolutions of 1648 and 1688, and the rights of all classes were reasonably well defined and protected.

Most of this working theory and practice was traditional and customary—true there were the great stars, Magna Carta, the habeas corpus act, the bill of rights, but most of the English constitution was unwritten and there was none of it which could not be destroyed by parliament.

When the new nation came to be formed on this continent, all this was lost—it was a matter of necessity that a form of government should be devised, and as there were many colonies to be parties to the scheme, it was a practical necessity that everything possible should be in writing. Hence the American “constitution:” and the example was followed in the several states.

This brought about the little known less remembered but extremely important difference between the meaning and connotation of the words “constitution,” “constitutional” in English and American<sup>3</sup> usage. The constitution in America is a document to be read by all men, *littera scripta quae manet*, binding in law upon all, to be interpreted by the courts.

“A written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done.”<sup>4</sup>

In England, the “constitution” was the totality of principles more or less vaguely and generally stated, upon which it was thought the land should be governed. These principles were not binding in law: the Parliament could violate, could change or reverse them at will. So, too, in American usage anything which is “unconstitutional” is illegal however wise and right it may be: in England to say that anything is “unconstitutional” is to say that it is legal but wrong and inadvisable.<sup>5</sup>

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<sup>3</sup> I use the word “American” in the usual sense of the word in the United States: Canadians sometimes used rather to resent the monopolization of the appellation American by the citizens of the United States, but that feeling is now practically extinct. We are not nor do we wish to be called Americans, though we are American: most of us are more than content to be simply Canadians.

<sup>4</sup> See my work “The Constitution of Canada,” The Dodge Lectures, Yale University, 1917, Yale University Press, New Haven, Conn., p. 52.

<sup>5</sup> These are of course general statements, substantially accurate but not to be subjected to microscopical analysis as the “constitution” of the United States and those of the several states not uncommonly are. Perhaps I may be pardoned for transcribing here what I said in Yale:

“In the ultimate analysis the difference arises from the fact that the fathers of this union of states knew how to write; and that having the

Canada never had a violent separation from the old land; she retained British connection as she retained the British flag. The separate provinces of which the Dominion of Canada was formed in 1867 had before that time obtained responsible government substantially as in England, i. e. the ministers of the Crown were responsible to the representatives in Parliament elected by the people.<sup>6</sup> These Provinces had all retained the constitutional theories as well as the nomenclature of England.

A union of all the British North American Colonies had been long thought of and had been recommended by many; but it was not until after the middle of the 19th Century that the matter became practical politics. In 1864 two conferences were held by the delegates from most of these provinces and there was drawn up a scheme of union.<sup>7</sup> One of the resolutions stated that the people of the provinces which were to unite "desire to follow the model of the British constitution so far as our circumstances will permit."<sup>8</sup>

The other resolutions contained the frame work of a written constitution *pro tanto*; but it was not elaborate or complete;

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power, they had that desire to reduce their views to a written form which characterises the philosopher.

"In the mother country, the philosophic students of the problems of politics also gave written expression from time to time to their views—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the nation at large.

"The fathers of this nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and formulated their theories in a document framed with much skill; and they had the fortune to have that document declared binding not only upon the nation as it then existed, but also upon the nation—speaking generally—as it was to be to the end of time."

<sup>6</sup> This evolution from a system of government not very unlike that of the thirteen colonies before the revolution of 1776-1783 was due in some measure to legislation of the Imperial Parliament, more to the instructions given to the governors by the home administration, and in the ultimate analysis, practically all to the increasing democracy of the people of the provinces themselves.

I do not give an account of this process of evolution—a short outline will be found in my Dodge Lectures, see note 4 above.

<sup>7</sup> A short account of these conferences will be found in my Dodge Lectures, pp. 29 sqq.

<sup>8</sup> See "Some Origins of the British North America Act," 1867, my paper read before the Royal Society of Canada, May, 1917, Trans. R. S. Can. 1917, pp. 71, sqq.

it did not purport to exhaust the rules of government but left much to tradition and established practice.

In theory the king is supreme over the colonies: he alone has the power to make and unmake, divide and unite them—this power he exercises with his Parliament, the Imperial Parliament at Westminster. And in law that Parliament of which the king is a part may legislate for all the British world.<sup>9</sup>

Accordingly a number of colonial statesmen were sent to London to formulate an act of Parliament and obtain its passing;<sup>10</sup> and the well-known "British North America Act 1867"<sup>11</sup> was the result. The preamble of that act reads as follows:—

"Whereas the provinces of Canada,<sup>12</sup> Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution<sup>13</sup> similar in principle to that of the United Kingdom."

This constitution was not to be precisely the same as that of the United Kingdom—had it been so, much of the act would have been omitted. Carrying out the principles arrived at at the conference in Quebec in 1864, specific provision was made

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<sup>9</sup> I have more than once been asked by an American who did not understand the real independence of Canada, "What would happen if the British Parliament were to pass legislation for Canada which Canadians did not approve of?" My answer has always been "What would happen if one illiterate full blooded negro were to be elected President of the United States?" Both are perfectly legal; both unthinkable.

<sup>10</sup> In form the British North American Act of 1867 is an exercise of power by the Imperial Parliament: in fact it is the legalizing of an agreement entered into by the colonies concerned. This is often overlooked and the form mistaken for the substance. The British North America Act was the production of colonial statesmen, the only change made or suggested by imperial statesmen being a change of the name from the "Kingdom" of Canada to the "Dominion" of Canada out of regard to the supposed sensibilities of the United States! For reasons not germane to the present purpose, I think that the change did harm to the Empire at large.

<sup>11</sup> Great Britain Pub. Gen. Stat. 30 Vic. cap. 3.

<sup>12</sup> The "Government of Quebec" formed by the Royal Proclamation of 1763 after the conquest of Canada and enlarged by the Quebec act of 1774 was in 1791-1792 divided into two provinces, Upper Canada and Lower Canada: these two provinces were united into one called "Canada" by the Union Act of 1840, 3, 4 Vic. c. 35 (Imp.) and it was this province of Canada composed of Upper Canada or Canada West (now Ontario) and Lower Canada or Canada East (now Quebec) which desired to unite with Nova Scotia and New Brunswick in one Dominion.

Nova Scotia may be considered as beginning her provincial life in 1749. The extent of the province was not very accurately defined but it included what is now New Brunswick and considerable more territory: in 1784 New Brunswick became a separate province and in 1820 Cape Breton theretofore separate was united with Nova Scotia.

<sup>13</sup> With a small "c"—not a "Constitution."



in the act for many matters—accordingly we stand between Britain and the United States—we inherit the traditional rules of England and at the same time we have, authoritatively laid down in writing, much by which we are bound. The British North America Act and the amendments to it are legally binding like the constitutions of the United States and the separate states; no Canadian Parliament or provincial legislature can lawfully transgress these, and any attempt to do so would be restrained by the courts on the complaint of one injured. But at the same time a large sphere is left uncontrolled by the written law—and in that sphere, Parliament and legislature are wholly uncontrolled—they have the traditional rules, but they may legally disregard these rules—the courts there have no power, the electorate must judge of the propriety of acts in that sphere and reward or punish accordingly.<sup>14</sup>

Moreover, a large part of the British North America Act gives rise to no litigation. The preamble contains this statement:

"It is expedient not only that the constitution of the legislative authority in the Dominion be provided for but also that the nature of the executive government therein be declared."

Much of the Act is concerned with the executive and that part does not give rise to litigation at all; the same is true of the formalities to be observed in legislating.

The portions of the act which have given rise to litigation are chiefly sections 91 and 92 which give the legislative powers

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<sup>14</sup> It is in part due to the double code of rules that some Canadians, amongst them members of the Bar, are apt to use the words "constitution," "constitutional," "unconstitutional" in the American sense—to a certain extent the influence of American usage is felt. The practice is perhaps increasing: it is sometimes found in Parliament—even so great a master of the English tongue and of constitutional law and practice as the late Sir Wilfrid Laurier has been known to offend in this regard. The accurate speaker uses the terms *intra vires* and *ultra vires* for the American "constitutional" and "unconstitutional."

In *Bell v. Burlington*, (1915) 34 Ont. Law Rep. 619, 9 O. W. N. 44, 182 counsel argued before a divisional court of which I was a member that his clients were not liable to pay taxes because by reason of a change in the boundaries of the municipality they had not had an opportunity to vote for the members of the town council which imposed the taxation, and "taxation without representation is unconstitutional." In giving judgment I said: "That this maxim is profoundly true may certainly be admitted, but we must carefully distinguish between the meaning of the word 'unconstitutional' in the British and in American usage." I pointed out that the maxim used the word in the former sense, and that if it were found that the taxation imposed was legally within the powers of the council it would be upheld as valid—*intra vires* although unconstitutional.

of the Parliament of the Dominion and of the legislatures of the provinces respectively.<sup>15</sup> A very considerable amount of private litigation even under these sections is prevented by references by the governments of the Dominion and the provinces as to the legality of legislation or proposed legislation.

In the Dominion, a statute<sup>16</sup> provides for a reference to the Supreme Court of Canada by the governor-in-council (i. e. the government) of important questions of law or fact touching the interpretation of the British North America Act, the powers of the Parliament of Canada, the legislatures of the provinces or the governments.

Before dealing with the sections already mentioned, it will be well to give a somewhat general outline of our system. An intelligent foreigner from reading the constitution of the United States could form a fairly accurate conception<sup>17</sup> of the methods

<sup>15</sup> The Dominion of Canada was originally constituted of four provinces, Ontario (formerly Upper Canada or Canada West) Quebec (formerly Lower Canada or Canada East),—Nova Scotia and New Brunswick—these were the provinces whose powers were defined in the act.

In 1870 the new province of Manitoba was created by the Dominion Parliament; in 1871 British Columbia was admitted as a province; in 1873, Prince Edward Island; in 1905 the new provinces of Alberta and Saskatchewan were created by the Dominion Parliament—so that now there are nine provinces in the Dominion, all with substantially the same powers. There is also the Yukon Territory as well as a vast unorganized extent of territory toward the North.

<sup>16</sup> Canada Rev. Stat. 1906, cap. 139 sec. 60 which reads as follows:

"60. Important questions of law or fact touching—

(a) the interpretation of The British North America Acts, 1867 to 1886; or,  
(b) the constitutionality or interpretation of any Dominion or provincial legislation; or,  
(c) the appellate jurisdiction as to educational matters, by The British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or,  
(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,  
(e) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;  
may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question."

The right of the Dominion to pass legislation of this kind, referring to the Supreme Court the question of the validity of a statute or a proposed statute has been approved by the Supreme Court itself and by the Judicial Committee of the Privy Council. In re References by the Governor-General etc. (1910) 43 Can. S. C. R. 536; on appeal [1912] A. C. 571. Some of the provinces have similar legislation, e. g. Ontario, Rev. Stat. 1914 c. 85; Manitoba, Rev. Stat. 1913 c. 38.

<sup>17</sup> There are some exceptions e. g. the electoral college was theoretically to be composed of a number of gentlemen of high standing who should

of government, etc., in the United States, but that is not the case in the government, etc., of Canada—the act must be read in the light of constitutional history and practice, and anyone ignorant of these who should take the Act at its face value and read it literally would go grievously astray.

Section 9 provides that the executive government and authority in and over Canada is to continue and be vested in the queen (now of course the king) and the appointment of a governor-general is provided for to carry on the government in the name of the queen(king). This once expressed a reality—the king was once an actual ruler and his personality was of importance—but now the sovereign does not meddle with administration or policy; his ministers responsible to the representatives of the people in parliament decide all such matters. If their course does not please the House of Commons, they are voted out of power and new ministers are put in their place.<sup>18</sup>

The Governor-General is in much the same case in Canada—he in theory carries on the government in the king's name—in fact the government is carried on by the ministers. He is

be elected by the people to exercise their judgment in selecting a president—and that is how the document sounds—everyone knows that the personnel of this college is of not the slightest importance but that the members are a mere conduit pipe to convey the thoroughly understood wishes of the voters. If after the election in 1916 every elector in the college believed Mr. Taft to be the best man for the presidential office not a vote would have been diverted from Wilson and Hughes even if they had been both considered utterly unfit.

<sup>18</sup> The last royal veto of a bill which had passed Parliament was that of the triennial bill reducing the term of Parliament to three years by the sour but able Dutchman, William III, in 1693; the bill was passed again in 1694 and this time it received the royal assent.

William III had a greater interest in continental affairs than in English politics but from time to time he exercised his royal prerogative with vigor. Anne gave her ministers some trouble but she was easily managed through her personal friends; George I knew no English and took no interest in his insular kingdom preferring that of Hanover on the Continent; George II did not interfere to any noticeable extent; George III was a king in fact as well as in name, he made and unmade ministries, took part in elections, he ruled England with the result of the loss of America; George IV was not so conscientious as his father but almost equally troublesome—his life of selfishness and debauchery disgusted his subjects and had his successor been like him it is not unlikely the fate of the monarchy would have been sealed, but William IV the sailor king placed himself in the hands of his ministry and the ascension to the throne of the girl queen Victoria and her sensible conduct practically ended republican sentiment in Britain. Edward VII was and George V is a model of constitutionalism; and it is certain that there is no place in the throne for the meddler in politics or the open debauchee.

It is a common but true saying that the king reigns but does not rule, the president rules but does not reign.



appointed by his majesty i. e. by the imperial administration.<sup>19</sup> The governor-general in council i. e. the Dominion administration appoints the lieutenant-governor of each province—that officer has the same functions and (want of) authority in the province which the governor-general has in the Dominion.

It will be seen, then, that the governor-general and lieutenant governors have no kind of analogy with the president of the United States—wholly different persons in Canada stand in that relation, i. e., the prime ministers.

The Dominion has two houses of Parliament, the Senate (the members of which are nominated by the government and sit for life) and the House of Commons (the members of which are elected by the people). There are two political parties<sup>20</sup> and the party lines are drawn very strictly: each has its chosen leader and the leader<sup>21</sup> of the party which is dominant in the House of Commons is the prime minister. The prime minister selects his colleagues all of whom must be members of Parliament and they collectively form the administration or government, and are responsible for administration and legislation. The same remarks apply in the provinces.

There is much closer analogy between the prime minister and the president than between the governor and the president.

<sup>19</sup> But care is taken that no one is appointed not approved of by the Canadian Administration.

<sup>20</sup> That is in normal times—the war has made strange bed-fellows—there is at this time a union government composed of conservatives and liberals in nearly equal numbers, and there is also a liberal party, composed of those who followed the late Sir Wilfrid Laurier in his opposition to conscription and a few others. Normally, however, there are the two parties, conservative and liberal; third parties make their appearance from time to time, like the “grangers,” the “equal rights party,” etc., but so far they have not prospered. At the present time a new third party has emerged in Ontario, the “united farmers;” time will show how successful it will be. Then the returned soldiers may form a party or may possibly act like the G. A. R., in swelling one or other of the existing parties.

[In writing this note I followed the wise method “never prophesy unless you know.” Since the note was written the United Farmers Organization has captured the Province of Ontario and has now a government in power.]

<sup>21</sup> While the prime minister must like all other ministers of the crown be a member of Parliament, it is not necessary that he should be in the House of Commons; he may be a Senator as were Sir John J. C. Abbott, (Premier, June, 1891–December, 1892) and Sir Mackenzie Bowell (Premier, December, 1894–April, 1896); the other six prime ministers, Sir John Alexander Macdonald (July 11th, 1867–November 7, 1873, and October 17, 1878–June, 1891), Honorable Alexander Mackenzie (November 7, 1873–October 17, 1878), Sir John S. D. Thompson, (December, 1892–April, 1896), Sir Charles Tupper, Bart. (April, 1896–July, 1896), Sir Wilfrid Laurier (July, 1896–October, 1911) and Sir Robert Laird Borden, (October, 1911, still in office) all belonged to the popular House.

But the term of office is not fixed: so soon as the prime minister loses the confidence of the popular House, he must give way to another—unless he can obtain the approval of the electorate. If defeated in a test vote in the House, he may call a new election—if the majority of those returned to the House support him, he remains in office, if not, he must retire and the leader of the opposite party comes in.<sup>22</sup>

All the members of the administration being in one or other of the Houses of Parliament, they explain and defend their conduct in office and the measures advanced by the government.

The Senate is of little importance compared with the House of Commons: it has no part in determining what political party shall hold the reins of power: it checks, alters and sometimes defeats proposed legislation but otherwise is of little significance.<sup>23</sup>

In all but two of the provinces, there is only one House, and that is wholly elective.<sup>24</sup>

#### AMENDMENTS

There is no power given to the Dominion to amend its own "constitution." The reason for this is historical. Lower Canada, now Quebec, was and is largely populated by French-speak-

<sup>22</sup> Sometimes a new prime minister takes the place of the old by an arrangement in the party itself, e. g. Sir John J. C. Abbott became prime minister in 1891 on the death of Sir John A. Macdonald. He retired in 1894 in favour of Sir John S. D. Thompson; on Sir John Thompson's death in 1896, he was succeeded by Sir Mackenzie Bowell, who retired in 1896 in favour of Sir Charles Tupper. Sir Charles failed to carry the country on the general election of 1896 and had to retire, being succeeded by Sir Wilfrid Laurier of the other party "the leader of the opposition."

Sir John Macdonald was in office 19 years: Sir Charles Tupper 3 months.

In Ontario, Sir Oliver Mowat was prime minister for nearly 24 years: Hon. Edward Blake for 10 months.

<sup>23</sup> The extraordinary difference in the relative power and importance of the Senate of the United States and the Senate of Canada calls for a separate treatise by itself. I do not here enter into the enquiry as to the causes of this difference.

<sup>24</sup> The two provinces with two houses are Quebec and Nova Scotia; Ontario came into Federation with only one House (1867); so did British Columbia (1871); New Brunswick abolished her "upper house" or Legislative Council by the Act of 1891 effective in 1892; Prince Edward Island did the same in 1893; Manitoba formed as a province with two Houses got rid of her Legislative Council in 1876; Saskatchewan and Alberta were created with but one House. "No province with only one chamber has ever desired two; while at least one of those with two (i. e., Nova Scotia) has groaned under the imposition. Nor has there been found crudity or want of thought more in the unicameral than in the bicameral Provinces." "The constitution of Canada, etc.," p. 103.

ing, Roman Catholic people of French descent: the other three provinces by English-speaking, generally Protestant and of English, Scottish or Irish descent. The French Canadian from the very beginning has been tenacious of his language and religion and not less so of his law and institutions. The law of French Canada is based upon the *coutume de Paris* and ultimately upon the civil law of Rome, that of English-speaking Canada upon the common law of England. From the time of the conquest, the French Canadian was jealous of English interference, of English influence, and was ever on his guard against English meddling with his affairs.

The British North America Act, being the production of French Canadians and English-speaking Canadians, represented their agreement with each other—an agreement which left French Canada to manage her own affairs: and the French Canadians would never have agreed to a provision authorizing a change in the agreement without their consent: they knew of course, that they were largely outnumbered by the English-speaking who were not always sympathetic with the French view. Accordingly there is no provision for amending the constitution of the Dominion.

What is done when it is desired to amend the constitution is simple—an address to the king passes both Houses of Parliament asking for an Act in the form presented—that is sent to Westminster and an Act is passed as of course.<sup>25</sup>

There being no need to consult French sensibilities in the provinces other than Quebec and the French being overwhelmingly powerful in Quebec itself, there was no need of protecting the provinces from constitutional amendment and consequently the provinces are given the power to amend their constitutions "except as regards the office of the lieutenant-governor. This exception would not on its face appear to lead to litigation: but a very important decision is based upon it.

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<sup>25</sup> The act being a compact, no such address is transmitted unless the Houses of Parliament are unanimous (or practically so); no amendment of the act asked for has been refused or even debated, no amendment has ever been made unless it was asked for by Canada—it is our business and that of no one else, English or otherwise.

It is from paying attention to the form and not to the substance that certain critics have made strictures on my account of affairs Canadian—strictures which would be called silly were they not due to ignorance. Amendments to our constitution are in fact made by ourselves; we seek Imperial legislation to give them legal validity.



In 1916, the Legislature of Manitoba passed an act<sup>26</sup> authorizing any number of electors not less than eight per centum of the voters at the previous general election to petition the legislature for the passage of any proposed law: the speaker was on being satisfied of the sufficiency of the signatures to lay the proposed law before the House and if the House refused or omitted to pass it, it was to be submitted to a vote of the electors: if it secured a majority of the votes, it became law. There was also a provision for referring a law to a vote with similar results. The validity of this legislation was referred under the authority of a provincial act<sup>27</sup> similar to the Dominion statute above mentioned<sup>28</sup> to the Manitoba court of king's bench—the chief justice gave a pro forma judgment affirming the validity of the act but the court of appeal reversed this decision by a unanimous judgment.<sup>29</sup> An appeal was taken to the Judicial Committee of the Privy Council at Westminster and that board affirmed the decision of the Manitoba court of appeal.<sup>30</sup> Their lordships of the privy council thought “that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the lieutenant-governor as an integral part of the legislature and to detract from rights which are important in the legal theory of that position”—the legal theory being that the lieutenant-governor directly represents the sovereign in the province and that when he “gives to or withholds his assent from a bill . . . it is in contemplation of law the sovereign that so gives or withholds assent.”

It is to be noticed that this decision is based upon the express exception of the act. It has long been held that both the Dominion and the provincial legislative bodies are supreme in the classes of cases given to their jurisdiction—they have original jurisdiction, they are not simply delegates of the Imperial Parliament, but may themselves delegate their powers or any part

<sup>26</sup> Man., 1916, 6 Geo. V. c. 59.

<sup>27</sup> Man., Rev. Stat., 1913, c. 38.

<sup>28</sup> See note 16, *supra*.

<sup>29</sup> Chief Justice Mathers, C. J. K. B., presided in the Court of King's Bench; in the court of appeal were (the late) Chief Justice Howell, C. J. M., and Richards, Perdue, Cameron and Haggart, JJ. A. 1916 27 Man. Rep. 1.

<sup>30</sup> [1919] A. C. 935, 35 Times Law Rep. 630. Lord Haldane, Lord Buckmaster (both ex-Lord-Chancellors) Lord Dunedin, Lord Shaw of Dunfermline and Lord Scott-Dickson constituted the board.

This decision is in line with expressions of opinion by the late Sir John A. Boyd, Chancellor of Ontario, in *Attorney-General of Canada v. Attorney General of Ontario*, (1890) 20 Ont. Law Rep. 222, 247.

of them.<sup>31</sup> The learning on the power of a state legislature to delegate its powers is fairly well collected in Cooley's Constitutional Limitations<sup>32</sup> and I do not pursue the enquiry.

The power given to the provinces to amend their constitution has had results which seem strange and even alarming to an American e. g. the legislatures of New Brunswick, Prince Edward Island and Manitoba abolished the second chamber,<sup>33</sup> that of Ontario elected for four years extended their term to six,<sup>34</sup> that of Alberta has made twelve of its members, members of the succeeding House without nomination or election,<sup>35</sup> the Dominion has taken away the right to vote from those of enemy birth naturalized before 1902.<sup>36</sup>

While the Parliament or legislature can extend its own life, the government of the Dominion or province can have an election at any time.

<sup>31</sup> *The Queen v. Burah*, (1878) 3 A. C. 889, 905; *Hodge v. The Queen*, (1883) 9 A. C. 117, 53 L. J., P. C. 1, 50 L. T. 301; *Russell v. The Queen*, (1882) 7 A. C. 829, 835, 51 L. J., P. C. 77, 46 L. T. 889; *Fredericton v. The Queen*, (1880) 3 Can. S. C. R. 505, 530; *Rex v. Carlisle*, (1903) 6 Ont. Law Rep. 718, 722.

<sup>32</sup> Cooley, *Constitutional Limitations*, 7th ed., pp. 163 sqq., and cases cited in notes.

<sup>33</sup> See note 15.

<sup>34</sup> Having first by the statute (1917) 7 Geo. V. c. 27, s. 9, rendered it unnecessary to have an election to fill a vacancy in the legislature caused by death of a member during the war, they in 1918 proceeded to enact (1918) 8 Geo. V. c. 4, that the legislature need not be dissolved until a year had elapsed and a session of the legislature held after the return of the Canadian forces overseas. There was one member who objected to this as "unconstitutional" (in our sense) although there was no doubt of its legal validity.

The Ontario Legislature acted as did the Imperial Parliament elected for three years under (1694) 6 W. & M. c. 2, which in 1716 extended its own life to seven years by the act 1, Geo. I, St. 2, c. 38, the well-known Septennial Act upon the "constitutionality" of which much was said on both sides.

During the war, the Imperial Parliament has several times extended its own life.

<sup>35</sup> Alberta Stat. 1917 c. 38. I know of no precedent for this proceeding. The twelve members had enlisted for overseas service and were considered unable to take part in any election until after the close of the war.

<sup>36</sup> The statement is general and not strictly accurate. The statute may be looked at for particulars. See the War Time Elections Act, 7-8 Geo. V. c. 39, and my discussion of it in "The Constitutional Review," Vol. 2, April and July 1918, pp. 71 sqq. 157 sqq. The right to deprive any class of citizens of a vote was expressly affirmed in the Judicial Committee of the Privy Council in *Cunningham v. Tomey Homma* [1903] A. C. 151 and Parliament approved the principle: "The rights of British subjects in Canada are rights given under the law of Canada; the law of Canada must be dictated by the needs of the hour for the safety of Canada," *inter arma silent leges*; and as Sir Wilfrid Laurier said: "If the Germans win the war nothing else on God's earth matters." The celebrated fifteenth amendment furnishes the American rule.

Of course in the United States, the time of elections and the life of the legislature are fixed by the constitutions and cannot be changed: while disfranchisement exists only as a punishment for crime or as a consequence thereof.<sup>37</sup>

#### NEW PROVINCES

The British North America Act did not contain an express power to create new provinces. Nevertheless in 1869-70 the Dominion Parliament provided for the formation of a new province, Manitoba, out of part of the newly acquired Hudson Bay Territory: it was not quite clear that this legislation was valid and an address was presented from both Houses of Parliament to her majesty and an act was obtained confirming the Canadian legislation and giving the power expressly to create new provinces.<sup>38</sup> Article IV, section 3 of the constitution of the United States provides for new states, etc.

#### DISALLOWANCE OF LEGISLATION

While the Dominion has plenary power to legislate upon the classes of subjects allotted to it, it is not to be forgotten that it is a part of the far-flung British Empire: the Dominion Parliament may be supposed to have Canada only in view, and its legislation might by possibility imperil or injuriously affect the interests, even the peace and security of the Empire at large. Accordingly when a bill is passed by both Houses of Parliament and presented to the governor general for signature, he has the power instead of assenting to it at once in the name of the king, to withhold that assent or reserve it for the signification of the king's pleasure, i. e. for the opinion of the home ministry. There has been no instance of assent being withheld—if it should be, a crisis would arise—nor has any bill been reserved. But even if assented to (which is the invariable practice) the king through

<sup>37</sup> Of course these are the merest common places; Black, *Constitutional Law*, 3rd ed. pp. 672 sqq. and cases there cited may be referred to. See the 14th constl. amendment.

<sup>38</sup> The original acts are 32, 33 Vic. c. 3, (Can.) and 33 Vic. c. 3 (Can.), the address is referred to in 206 Hansard (3rd series) p. 1171, the Imperial Act is (1871) 34 Vic. c. 28 (Imp.). It was under this legislation that the Provinces of Alberta and Saskatchewan were formed by the Dominion in 1905 by (1905) 4, 5, Edw. VII, cc. 3 and 42 (Dom.).

The power to create new states and the method pursued are fully set out in Black, *Constitutional Law*, 3rd ed., 281, sqq. See the constitution, art. IV, sec. 3.



the home administration may within two years of its receipt disallow it—this has been done with only one bill and that rather at the instance of the Canadian administration.<sup>39</sup>

So, too, provincial legislation may be disallowed by the Dominion administration within one year: the practice of the Dominion government has not been uniform but of recent years the power of disallowance has not been exercised except where the legislation is *ultra vires* the province. That the legal power exists in every case is, however, undoubted, and the exercise of the power has at least twice been the battle ground of the political parties, and may be again—when it will be for the electorate to judge whether the power was rightly exercised in the interests of Canada.

Of course, there is nothing like this in the United States: the states are wholly separate and independent: and they cannot be controlled in their legislation by the central government.<sup>40</sup>

#### DIVISION OF SUBJECTS OF LEGISLATION

Sections 91 and 92<sup>41</sup> of the British North America Act enumerate the classes of subjects of legislation allotted to the

<sup>39</sup> In May, 1873, a bill authorizing the examination of witnesses on oath before Parliamentary Committees in certain cases received the assent of the governor-general; the Canadian minister of justice expressed doubts of its legality and the Law Officers at Westminster advised that the Bill was *ultra vires* the Dominion, i.e., "unconstitutional" in the American sense and it was disallowed on that ground.

<sup>40</sup> Rather to the embarrassment of the United States in some well-known cases. California seems to have been particularly recalcitrant.

The course pursued if the home administration considers an act of the Canadian Parliament objectionable is to communicate with the Canadian Government explaining fully the objectionable features. After the matter has been considered, the Canadian Parliament at its next session heals the defects. There are to be no more quarrels between the home government and colonial parliaments, one Bunker Hill was enough.

<sup>41</sup> Sections 91 and 92 read as follows:

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say: 1. The Public Debt or Property; 2. The regulation of Trade and Commerce; 3. The raising of money by any mode or system of Taxation; 4. The borrowing of money on the public credit; 5. Postal Service; 6. The Census and Statistics; 7. Militia, Military and Naval Service and Defence; 8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada; 9. Beacons, Buoys,

Dominion and the provinces respectively—the Dominion being allotted “all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces.” So that the unenumerated matters go to the Dominion.

Lighthouses and Sable Island; 10. Navigation and Shipping; 11. Quarantine and the establishment and maintenance of Marine Hospitals; 12. Sea coast and inland Fisheries; 13. Ferries between a Province and any British or foreign country or between two Provinces; 14. Currency and Coinage; 15. Banking, incorporation of banks, and the issue of paper money; 16. Savings' Banks; 17. Weights and Measures; 18. Bills of Exchange and Promissory Notes; 19. Interest; 20. Legal tender; 21. Bankruptcy and Insolvency; 22. Patents of invention and discovery; 23. Copyrights; 24. Indians, and lands reserved for the Indians; 25. Naturalization and Aliens; 26. Marriage and Divorce; 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters; 28. The Establishment, Maintenance, and Management of Penitentiaries; 29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned “exclusively to the legislatures of the provinces.”

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

“92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: 1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor; 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes; 3. The borrowing of money on the sole credit of the Province; 4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers; 5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon; 6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province; 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals; 8. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial, local, or municipal purposes; 10. Local works and undertakings other than such as are of the following classes: a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province; b. Lines of steam ships between the Province and any British or foreign country; c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces; 11. The incorporation of companies with Provincial objects; 12. The solemnization of marriage in the Province; 13. Property and civil rights in the Province; 14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts; 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section; 16. Generally all matters of a merely local or private nature in the Province.”



In the United States anything not expressly or impliedly given to the central authority remains in the states, by the tenth constitutional amendment.

It cannot be too carefully borne in mind that the powers of the Dominion and provinces are within the limits prescribed by the act as plenary and ample as the Imperial Parliament possessed and could bestow.<sup>42</sup>

The legislative power is to be exercised not directly by the people but by Parliament and legislature, in other words, there is to be representative government. This in itself would have been sufficient to decide the initiative and referendum case from Manitoba already referred to, and the principle was in fact much relied on especially in the Manitoba court. That the people were considered to be represented by those whom they had elected to represent them was well illustrated at the time the British North America Act was under consideration in the Imperial Parliament. The legislature of Nova Scotia had approved the scheme of union but a strong agitation sprang up headed by very influential leaders, and a very numerous signed petition was sent from the province to Westminster against the proposed act. It was, however, considered that the attitude of the province must be gathered from the action of the legislature rather than from that of the people or some of them and the petition was wholly ineffective.<sup>43</sup>

As has already been indicated this does not prevent the legislative bodies from giving large powers to boards, councils, etc. For more than a century we have had some kind of municipal system, for three quarters of a century a somewhat extensive one—the province divided into cities, towns, villages, counties, townships, each of these municipalities has its council elected by the people and having very large powers of legislation in matters closely affecting the inhabitants of the municipality. So, too, boards of commissioners have been formed which validly enacted regulations in the nature of by-laws of a local character for the good government of taverns, the sale of liquor, etc.<sup>44</sup>

<sup>42</sup> I do not here discuss the vexed question of extraterritoriality but confine my remarks to legislation in and for Canada, the rights and duties in Canada of those in Canada. Those interested in the question of the extraterritorial powers of Dominion and Province may consult Lefroy's "Canada's Federal System." Toronto, 1913, pp. 105, 106, 185 and other works on the Canadian constitution.

<sup>43</sup> See the debates in 185 Hansard (3rd Series).

<sup>44</sup> See the discussion of such matters in *Hodge v. The Queen*, (1883) 9 A. C. 117, 53 L. J., P. C. 1, and cases cited in argument and decision.



As was to be expected it was sometimes found impossible to draw a clear line of demarcation in the act between the subjects allotted to Dominion and those allotted to province: an examination of the sections will at once make manifest that many subjects are from one point of view in one class, from another in another. This has been the cause of considerable litigation—I shall mention a few instances only.

By section 91(26) the Dominion legislates on "Marriage and divorce;" by section 92(12), the province on "The Solemnization of marriage within the province." Under the former, the Dominion in 1882 repealed all laws prohibiting marriage with a deceased wife's sister,<sup>45</sup> under the latter the Province of Ontario in 1907 authorized the high court to adjudge that a valid marriage had not been entered into if a party under 18 had not obtained the consent required by the Marriage Act.<sup>46</sup>

For many years much irritation was felt in Protestant circles at the practice of the Quebec courts declaring to be illegal, marriages in that province (usually between Catholic and Protestant) which were not in accordance with the ecclesiastical and canon law of the Church of Rome. Legislation was proposed in the Dominion Parliament to correct this practice and protect the innocent spouse; but before passing the bill it was thought wise to ask the Supreme Court of Canada whether such a statute could be validly enacted. The Supreme Court held that the proposed bill was *ultra vires* the Dominion, and this was sustained in the Judicial Committee.<sup>47</sup>

Section 91(8) gives the Dominion power over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada," and it was long thought that the provinces could not give power to municipalities to tax Dominion-paid salaries, notwithstanding section 92(8) where-

<sup>45</sup> By the statute (1882) 45 Vic., c. 42 (Dom.). Before that act the law (at least in Ontario) was that such a marriage could be declared illegal if attacked in the lifetime of the parties but not after the death of either. *Re Murray Canal: Lawson v. Powers*, (1884), 6 Ont. Rep. 685; *Hodgins v. McNeil*, (1862), 9 Gr. Ch. R. (U. C.) 305.

<sup>46</sup> By the statute (1907) 7 Edw. VII, c. 23, s. 8, (*quorum pars magna fui*). We have no divorce court in Ontario; the statute has been declared valid by judgments of the supreme court of Ontario but it has not yet been considered in the Supreme Court of Canada or the Judicial Committee of the Privy Council.

<sup>47</sup> *In re Marriage Laws*, (1912) 46 Can. S. C. R. 132, affirmed [1912] A. C. 880. I give but the barest outline of the case: those interested may consult the reports which furnish entertaining reading useful for the constitutional lawyer.

by the province is given power over "municipal institutions in the province." But this view of the law received its deathblow in the Supreme Court of Canada in 1908 and now judges and civil servants of the Dominion generally are taxable like ordinary mortals.<sup>48</sup>

Section 91(15) gives the Dominion "banking, etc.:" but nevertheless the province under section 92(2) "direct taxation within the province in order to the raising of a revenue for provincial purposes" can tax banks doing business in the province.<sup>49</sup> By reason of the restriction to "direct taxation" however, the province cannot impose a tax of ten cents on each exhibit produced in court<sup>50</sup> or impose a fee of twelve dollars in stamps upon filing a jury notice<sup>51</sup> or compel an insurance company to put a stamp on every policy, renewal and receipt. All taxation which might from some point of view be considered indirect does not, however, fall within the prohibition—brewers and distillers may be compelled to pay a license fee, medical men to pay a fee on being registered, mortgagees to stamp mortgages, the registrar to pay to the county a proportion of the fees received for registering deeds, etc., although they contend with more or less

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<sup>48</sup> The former view was based upon such cases as *Leprohon v. City of Ottawa*, (1877-8) 40 Up. Can. Q. B., 478, 2 Ont. Ap. Rep. 522; *Exp. William*, (1898) 34 New Bruns. 530; *Desjardins v. Cité de Quebec*, (1900) 18 Que. Sup. Ct. 434; *Exp. Burke*, (1896) 34 New Bruns. 200; all these were over-ruled by *Abbott v. City of St. John*, (1908) 40 Can. S. C. R. 597, 38 New Bruns. 421. In my own court we recently held that the salary of a judge is taxable by the city in which he lives, reversing the judgment of the county court. *City of Toronto v. Morson*, (1917) 40 Ont. Law Rep. 227.

<sup>49</sup> *Bank of Toronto v. Lambe*, (1887) 12 A. C. 586, 56 L. J., P. C. 87, 57 L. T. 377.

<sup>50</sup> *Attorney-General of Quebec v. Reed*, (1883) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618. The prothonotary of the superior court at Montreal refused to file a promissory note (upon which Reed, the plaintiff, based his action) without the ten cent stamp required by the legislation of the Province of Quebec, 43, 44, Vic. c. 9 (Que.); the plaintiff took out a rule to compel him to do so. The attorney-general of the province intervened to support the prothonotary. Mr. Justice MacKay held that the legislation was ultra vires; the court of queen's bench in appeal (Monk, Ramsey, Tessier and Cross, J. J.; Dorion, C. J. dissenting) reversed this decision but it in its turn was reversed by the supreme court of Canada whose reversal was sustained by the Judicial Committee of the Privy Council. *Loranger v. Reed*, (1882) 26 Low. Can. Jurist 331, *Reed v. Mosseau*, (1883) 8 Can. S. C. R. 408; *Attorney-General for Quebec v. Reed*, (1884) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618, 3 Cartwright Const. Cas. 190.

<sup>51</sup> *Plummer Wagon Co. v. Wilson*, (1886) 3 Man. Rep. 68. But there is no interference with the long established fees in Ontario for such purposes. The insurance case is *Attorney-General for Quebec v. Queen Insurance Company*, (1878) 3 A. C. 1090, 38 L. T. 897.

justice that they may be able to shift the burden to the shoulders of others.<sup>52</sup>

There is no such limitation to the power of taxation given to the Dominion by section 91(3) "the raising of money by any mode or system of taxation."

The provisions of the constitution of the United States as to taxation are of course well known to every American lawyer—the question of direct and indirect taxation has come up more than once.<sup>53</sup> There is no such provision as to direct taxation by either Dominion or province as is contained in the constitution, article 1, section 9, that it must be "in proportion to the census or enumeration."

Nor is there any prohibition against a tax or duty on articles exported.<sup>54</sup>

The Dominion authorizes the governor in council by proclamation to impose an export duty on nickel or copper matte or ore, crude or partially manufactured, lead, silver, pig lead, etc.<sup>55</sup>

Our province of Ontario has gone even further and absolutely forbids the export of logs, etc., cut on public lands altogether, requiring their manufacture in Canada into boards, deals, pulp, paper, etc., and the Dominion forbids the exportation of wild turkey, quail, etc., under penalty of fine and seizure of the game.<sup>56</sup>

<sup>52</sup> *Brewers and Distillers—Brewers and Malsters' Association of Ontario v. Attorney General for Ontario* [1897] A. C. 231, 66 L. J., P. C. 34, 76 L. T. 61; *Rex v. Niederstadt*, (1905) 11 Brit. Col. Rep. 347. *Medical men, Le College de Medecins v. Bingham*, (1888) 16 Rev. Leg. 283 (Quebec). *Mortgagees—In re Yorkshire Guarantee and Securities Corporation, Limited*, (1895) 4 Brit. Col. Rep. 258. *The Registrar of Deeds—County of Hastings v. Ponton* (1880) 5 Ont. App. 543.

Some of these cases can be and have been supported on the strength of section 92 (9) "shop, saloon, tavern . . . and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

<sup>53</sup> Constitution of the United States, art. 1, sec. 2, "representatives and direct taxes shall be apportioned . . ." Sec. 8 "The Congress shall have power to levy and collect taxes, duties, imports and excises . . ." Sec. 9. "No capitation or other direct tax, shall be laid unless in proportion to the census or enumeration . . ." In *Springer v. United States* (1880) 102 U. S. 586, 26 L. Ed. 253, it was considered that "direct taxes" within the meaning of the constitution are only capitation taxes and taxes on real estate, but the meaning was extended in *Pollock v. Farmers' Loan & Trust Co.*, (1894) 157 U. S. 429, 39 L. Ed. 759 15 S. C. R. 673, s. c. (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 912 (rehearing by the full court) to include taxes on the rent or income of real estate, and also taxes on personal property or on the income of personal property. Such direct taxes to be valid must be apportioned as provided for in art. 1, secs. 2, 9.

<sup>54</sup> U. S. constitution, art. 1, section 9.

<sup>55</sup> See Can. Rev. Stat. 1906 c. 50.

<sup>56</sup> See Ont. Rev. Stat. 1914 c. 29.



Returning from this digression, section 92(10), a, excludes from provincial jurisdiction “. . . railways . . . extending beyond the limits of the province” and therefore that subject is for the Dominion and no province or municipality under provincial authorization can validly legislate affecting the construction or operation of a railroad of this character; but that does not prevent section 92 (13) being fully effective. The province or a provincial municipality could not compel a railway company to erect proper fences on their railway on penalty of being responsible for all cattle killed on the line or compel the company to make its ditches of any prescribed construction but it can compel the keeping of the ditches open and the removal of obstructions which would cause inundation of the adjoining lands<sup>57</sup> and the workmen's compensation for injuries act of the province applies for the protection of workmen on the railway.<sup>58</sup>

There are indeed instances where there is almost or quite insuperable difficulty in separating the jurisdictions so that they actually overlap or interlace—in such cases neither legislation is ipso facto, ultra vires, either will be intra vires unless and until interfered with by the other, and where there are legislation by both Dominion and province, the provincial legislation must give way.<sup>59</sup>

Leaving this branch of the subject—it is next to be observed that our legislators are not prohibited from passing ex post facto laws as is the case in the United States.<sup>60</sup>

Nor is there any prohibition like that in the constitution forbidding the states to pass any “law impairing the obligation of contracts.”<sup>61</sup> When “contract” was interpreted as including a charter to a university, the decision in the *Dartmouth College Case*<sup>62</sup> was inevitable—the old Province of Upper Canada and that of Canada destroyed the Charter of King's College, Toronto, and changed its whole character—took away the rights of

<sup>57</sup> The fence case is *Madden v. Nelson & Fort Sheppard R. Co.*, [1899] A. C. 626, 68 L. J., P. C. 148, 81 L. T. 276; the ditch case, *Canadian Pacific R. W. Co. v. Notre Dame de Bonsecours Parish*, [1899] A. C. 367, 68 L. J., P. C. 54, 80 L. T. 434.

<sup>58</sup> *Canada Southern Ry. Co. c. Jackson*, (1890) 17 Can. S. C. R. 316.

<sup>59</sup> *Grand Trunk R. W. Co. v. Attorney-General of Canada*, [1907] A. C. 67, 69, 76 L. J., P. C. 23, 95 L. T. 631, 23 T. L. R. 40; *City of Montreal v. Montreal Street R. W. Co.*, [1912] A. C. 333, 81 L. J., P. C. 145; *Rex v. Hill*, (1907) 15 Ont. Law Rep. 406.

<sup>60</sup> U. S. constitution art 1. secs. 9, 10.

<sup>61</sup> *Ibid.*, art. 1, sec. 10.

<sup>62</sup> *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

the Church of England and made a new University of Toronto wholly nonsectarian. New Brunswick acted in much the same way with its provincial university and there can be no doubt of the power still existing.

#### PROPERTY AND CIVIL RIGHTS

Much of the above and much of the difference between the law of the United States and ours derive from the power given to the provinces by section 92(13) over "property and civil rights in the province." In the absence of such limitations as are contained in the constitution of the United States, such as has been mentioned and the last clause of the fifth constitutional amendment directing "nor shall private property be taken for public use without just compensation," our provincial legislatures have the undoubted power to take private property for public use or even for any use whatever public or private and without compensation.

The leading case is one in which on the assumption that a certain mining company had not done the work required to entitle them to a certain mining location, the minister had granted it to another company and the legislature passed an act vesting the location in this company. I held assuming that the first named company had acquired the right to location, the legislature had the power to take it away and give it to another: and that view of the law was sustained by all the courts.<sup>63</sup>

Mill privilege owners are given the right to expropriate land above and below their mill to increase their water power: in most if not all cases, compensation is directed to to be paid but

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<sup>63</sup> *Florence v. Cobalt*, (1908) 18 Ont. Law Rep. 275. I used these words: "If it be that the plaintiff acquired any rights . . . the legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."

I would not have it understood that the action of the government and legislature was dishonest. The government satisfied itself by careful enquiry and satisfied the legislature that the plaintiff company was asserting a wrongful claim; although I decided the case on the hypothesis that the plaintiff had acquired a right to the property, I did not decide that it had. The prime minister in the house when the case was under appeal declared that if the appeal court should decide that the plaintiff company had any right, it would be amply compensated by the province for its loss. The court of appeal and the Judicial Committee both decided that the plaintiff company had no right whatever. If any government should be guilty of dishonesty, it could not succeed at the next election, even if it should be able to carry the House; we are reasonably honest as peoples go.

such a direction is in no way essential to the validity of the statute.

Then the provisions of a trust deed or a will can be changed by a provincial legislature.<sup>64</sup>

A provincial legislature can and a state legislature cannot put a retro-active interpretation upon the words of its own statute different from that already given to the words by a court of competent jurisdiction.<sup>65</sup>

Our legislatures may go still further and prohibit an action in the courts altogether; they may direct the courts to stay their hand in any action already brought or to be brought.<sup>66</sup>

That a provincial legislature can confiscate private property within the province is wholly beyond question: but its jurisdiction in that regard is not extra territorial. In 1909 Alberta guaranteed certain bonds of a railway company, the money to be raised by the sale of the bonds to be deposited in a bank in the province and paid out to the company from time to time as the road was built. The bonds were sold in England, the company defaulted in the interest, the road was not completed, but some \$6,000,000 of the proceeds of the bonds lay in the Royal Bank at Edmonton, Alberta, to the credit of a special account of the

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<sup>64</sup> The leading case is the Goodhue Will Case, *re* Goodhue, (1872) 19 Gr. Ch. (Ont.) 366; 1 Cartwright Const. Cases 360. Goodhue had left a will which directed the residuary estate to accumulate during the life of his widow—the children of any child who should die in her lifetime to take the parent's share at her death. The children of Goodhue executed a deed providing that each should have his share at once, and the legislature validated this deed. The court held that this legislation was *intra vires* as being on "property and civil rights." There is a rule of the legislature that before such a private bill is passed, it is to be submitted to two justices of the supreme court who report as to its legal effect and its advisability, but this is a domestic rule and its observance is in no way essential to the validity of the legislation. Such legislation takes place almost every year, sometimes to disentangle or explain a complicated, inconsistent will or settlement, sometimes for the advantage of beneficiaries in relieving them of burdensome and unreasonable restrictions, sometimes for public reasons. It is a jurisdiction that should be and is exercised with extreme care; but there is no "constitutional limitation" preventing its exercise in any case.

For the American doctrine in such cases see *Hillyard v. Miller*, (1849) 10 Pa. St. 326; *Shonk v. Brown*, (1869) 61 Pa. St. 327; *Alters' Appeal*, (1871) 67 Pa. St. 341, 5 Am. Rep. 433, and like cases.

<sup>65</sup> *Greenough v. Greenough*, (1849) 11 Pa. St. 489, 51 Am. Dec. 567.

<sup>66</sup> In *Smith v. London*, (1909) 20 Ont. Law Rep. at p. 142, I said: "The legislature has said that this action shall be stayed. My duty is loyally to obey the order of the legislature and it is stayed accordingly."

For the American practice see such cases as *State v. Adams*, (1869) 44 Mo. 570.

Then we have a number of indemnity statutes which prevent actions being brought at all.



treasurer of the province and the company. A new government coming in, the legislature passed an Act declaring, *inter alia*, that the \$6,000,000 and interest was the property of the province free and clear of any claim by the company. The bank refused to pay the money. The trial court and the supreme court of Alberta held the legislation valid but this decision was reversed in the Judicial Committee of the Privy Council on the ground that the purchasers of the bonds were to be paid at Montreal outside the province of Alberta, that their civil right to be paid had its locus there and that the legislation interfered with rights outside the province.<sup>67</sup>

This is a convenient place to say a word of the jury: as is well known the seventh constitutional amendment gives the right to a trial by jury in suits at common law where the value in controversy exceeds twenty dollars.

In our province beginning with 1868 there has been a progressive movement against compulsory jury trials in civil cases so that at present there are only a few classes of cases (such as libel, slander, etc.) in which a jury trial is as of right; in all other cases the judge may strike out the jury and try the case himself.<sup>68</sup>

I do not think it is necessary further to pursue this subject; it may be said that to determine whether any legislation is or is not *intra vires*, we should examine the list of subjects of legislation allotted to the legislating body, and if the legislation is upon any of these subject it is valid.

It has been said:

"In matters within its jurisdiction, the legislature has the same powers as Parliament, and 'the power . . . of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws concerning matters of all possible denominations.' Blackstone's Commentaries, Book 1, p. 160. Within the jurisdiction given to the legislature of the province no power can interfere with the Legislature, except, of course, the Dominion authorities, whose interference may occasion disallowance.

<sup>67</sup> *The King v. Royal Bank*, (1912) 4 Alberta Law Rep. 249; *Royal Bank of Canada v. The King* [1913] A. C. 283; 82 L. J., P. C. 33, 108 L. T. 129, 29 T. L. R. 239, 9 Dom. Law Rep. 337. In the notes to the last named report will be found a convenient collection of cases which may be consulted with interest and profit.

<sup>68</sup> See address delivered before the Judicial Section of the American Bar Association at Boston, September 3, 1919.

"In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine."<sup>69</sup>

But there is one thing a legislature cannot do—it cannot tie its own hands or the hands of a future legislature—it cannot by anticipation control the actions of a future legislature or its own—it cannot legally bind itself to any course of action.<sup>70</sup>

Perhaps sufficient has been said to show differences in the American system and ours, but after all is it not an illustration of the saying:

"It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count?"

"In your land as in mine the government and legislators respond pretty well to public sentiment—a little more quickly a little more slowly—both lands get the government they deserve. At odd times the courts will with you check for a while useful legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of constitutions—the 'Philadelphia lawyer' of proverbial note—can see much difference between 'tweedledum and tweedledee.' And a method can always be found without giving the court or the constitution too cruel a jolt for giving the people what they really demand and insist upon."

In Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal—a new government would be voted into power and the wrong righted, but we will not submit to have our great public works delayed by cranks or the litigious. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land—neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people. True the Union Jack and Old Glory have the col-

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<sup>69</sup> Language of my own in *Florence v. Cobalt*, (1908) 18 Ont. Law Rep. at p. 279.

<sup>70</sup> Language of my own in *Smith v. London*, (1909) 20 Ont. Law Rep. at p. 142.

The legislature had enacted that the section should be "forever stayed." I refused to stay the action perpetually but made the order that no proceedings should be taken in the action unless and until the legislation should in some way be got rid of.

ours red, white and blue differently arranged—but they are the same red, white and blue.

Of precious blood its red is dyed,  
The white is honor's sign;  
Through weal or ruth its blue is truth,  
Its might the power divine.

As we are of the same blood, our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.<sup>71</sup>

WILLIAM RENWICK RIDDELL.\*

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\*Justice of the Supreme Court of Ontario.

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<sup>71</sup> I make no apology for once more repeating what I said to the Iowa Bar Association in June, 1912, already repeated at Yale in 1917.



## THE INTERNATIONAL STATUS OF THE BRITISH DOMINIONS WITH RESPECT TO THE LEAGUE OF NATIONS\*

By ARTICLE I of the covenant "The original members of the League of Nations shall be those of the signatories which are named in the annex to this covenant and also such of those other states named in the annex as shall accede without reservation to this covenant."<sup>1</sup> Among the original signatories named in the annex are: The British Empire, Canada, Australia, South Africa, New Zealand and India. By article III the assembly "shall consist of representatives of the members of the League. . . . At meetings of the assembly each member of the League shall have one vote and may not have more than three representatives."

The provision for British representation is perhaps the most striking feature in the constitution of the assembly. The United Kingdom, strange to say, loses its identity as an international state and in so doing forfeits its right to distinct representation.<sup>2</sup> It is absorbed in the British Empire and secures representation as a part of that empire. India and the self-governing colonies, on the other hand, are accorded a privileged position in the League. They are given separate representation in their own names and are furthermore represented through the British Empire. Their international status, like their constitutional, is indeed a most anomalous one. They are suspended like Mohammed's coffin, between heaven and earth. They have achieved the miraculous in their constitutions, since they have combined the attributes of nationality with the status of dependency. In short, they defy all scientific classifications according to the recognized forms of modern states. They stand in a distinct category of their own; they are both states and colonies at one and the same time.

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\*[This article, though complete in itself, is a continuation of the subject discussed by the same author, Representation on the Council of the League of Nations, 4 MINNESOTA LAW REVIEW 147. Ed.]

<sup>1</sup> Treaty of Peace with Germany, International Conciliation, No. 142, Sept. 1919.

<sup>2</sup> The League of Nations and the British Commonwealth, The Round Table, No. 35, p. 479. June, 1919.

BOSTON UNIVERSITY



LAW REVIEW

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# BOSTON UNIVERSITY SCHOOL OF LAW

With the great development following the Civil War came the need, as now, of increased educational facilities, particularly in the Law; the lawyer's office could no longer meet the call for trained legal minds. This necessity was felt in Boston; the Boston University, recently organized, was appealed to by earnest men interested in the establishment of a Law School, and promptly responded.

The Trustees of Boston University, in the autumn of 1871, appointed Francis A. Perry, of their number, and Melville M. Bigelow a committee to examine and report upon the advisability of adding a School of Law to the University. Upon the advice chiefly of Henry W. Paine, Dr. Bigelow made the report to the Trustees, in January, 1872, in favor of the project; whereupon Isaac Rich, of the Trustees, at once moved that the School of Law be established. The motion was carried unanimously, and the School was opened the following September with a class of some fifty students, among them a number of members of the Bar. The building on Ashburton Place now occupied by the School of Law is named in memory of Isaac Rich, large credit being due to him for the founding of the School.

The first Faculty and Lecturers consisted of a group of men of marked ability and learning: George S. Hillard, Dean; Judge Edmund H. Bennett, Judge Benjamin F. Thomas, Judge Dwight Foster, Dr. Francis Wharton, Henry W. Paine, Charles Theodore Russell, Edward L. Pierce, N. St. John Green, Dr. Edward Ordronaux and Melville M. Bigelow. Dr. Bigelow is the only survivor, and his association with the School has continued from the first day until now without interruption. About a year after the School started Mr. Hillard, owing to illness, was unable to discharge the duties of his office, and Mr. Green acted as Dean until Edmund H. Bennett, an able jurist, was chosen in 1876 as Mr. Hillard's successor. Under the wise administration of Judge Bennett the School grew and developed. Worthy successors followed Judge Bennett in the Deanship; after his death, January 2, 1898, his son, Samuel C. Bennett, now a prominent member of the Boston Bar, served as Dean until 1902; Dr. Bigelow until 1911; Alonzo R. Weed, also a well-known member of the Boston Bar, acting as Dean until the election in 1912 of Homer Albers, the present Dean, whose association with the School dates back over thirty-five years and whose ability and successful administration have added to the prestige and usefulness of the School of Law and prepared it for the service that is ahead.

The School of Law of Boston University is nearing the half century mark. Proud of its accomplishments and service rendered, for its graduates number over twenty-five hundred and include many notables from both Bench and Bar, it looks forward confidently to a future of greater opportunity and usefulness.



## WHAT IS CANADA, ANYWAY?

BY WILLIAM RENWICK RIDDELL,<sup>1</sup> LL.D.,  
F.R. HIST. SOC., ETC.

(Not many months ago as guest of an American Society I spoke in an American city about my country's position nationally and internationally—at the close of my address, my neighbor, the Chairman, asked me in a perplexed voice "What is Canada, anyway?" The present paper is a partial and very imperfect reply.)

There are two classes of persons who will not be able to follow this paper and they are warned in advance—"Procul o procul este."

They are first those who are unable or unwilling to distinguish the people of England a century and a half ago, the real people of England, the best and most thoughtful of England, from their ill-balanced, ill-taught, half-insane Hanoverian King—those who firmly maintain, as though a matter of religious belief, that "England" is an oppressor, opposed to freedom, a despot, "perfidious Albion," and the "bloody Saxon." To these, I make no appeal; they are not open to argument.

Again, there are those who cannot see beyond the letter, to whom, if anything is in print, it must mean what the print says—to whom the maxim "the letter killeth but the spirit giveth life" is foolishness. These could not, if they would, understand.

No one can appreciate what Canada is without some knowledge of her history. It were idle to speak of her nine Provinces, of her immense territory of fertile lands, her forests and her pines, of her commerce on every sea, her ships in every port, of her nine millions of people—or even of her part in the Great War, of her thousands dead and tens of thousands disabled in defense of freedom and democracy—this can be found in every Year Book. What I shall speak of is her system of government and her national and international status—and that implies some history.

It would be impossible in one article or in ten adequately to set forth the history of the Dominion: it may suffice if I sketch that of the Province formerly Upper Canada, now Ontario.

When Quebec fell in 1759, Montreal in 1760, and Canada became British, there were no English-speaking and but a very few French-speaking settlers in this territory. The folly of a pig-

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<sup>1</sup>Justice of the Supreme Court of Ontario; one of Canada's most eminent living jurists and legal historians and also celebrated not only as a distinguished author but as a brilliant orator.—ED.

headed King and the spirit of the Colonists in the Thirteen English Colonies brought on a struggle—an armed struggle—and there was no room for Colonists who believed in constitutional means alone for obtaining the inherent rights of every man under English law. Thousands of these made their way into the Wilderness: true to their allegiance, they “scorned an alien’s name,” and passed into exile “leaving all behind except their honour.” Like their congeners of the previous century, the Cavaliers, they suffered for their loyalty and were proud of it. The United Empire Loyalists founded Upper Canada.

They brought with them two principles which have ever since actuated Canadians and are our governing principles today.

We will not give up our share of the old Flag, we will not cut ourselves away from the traditions of our race and people, we will not separate from our brethren across the sea—in a word we will continue to be British.

The other principle is equally dear and is indeed if possible even more fundamental—we will govern ourselves.

These two principles have always been at the root of our Canadian life. For a quarter of a century the early settlers were too deeply engaged with the struggle for existence, the fight for life with inanimate nature, to concern themselves with the government of their land, particularly as the Mother Country paid every cent of the cost of protection and administration, including the judiciary. Upper Canadians a little more than a century ago began to pay their own expenses and to take an intelligent interest in their government.

By that time a kind of oligarchy had grown up—there is a great deal of human nature in man, and not less so in Toronto than elsewhere. Irresponsible power is apt to become oppressive and to seek by all available means to secure its own perpetuation—it is not wholly unknown that even a President of the United States has been charged with being an autocrat and with endeavoring to continue his predominancy—not to speak of the normalcy of such a charge—toward the end of a second term.

Colonial Governors being sent from time to time from across the sea were forced to rely in great measure upon their local advisers and naturally their views were affected by their surroundings—they resisted the demands for self-government by the Colonists, until at length in 1837 the radical element broke into open rebellion. That was too much for the majority of Upper Canadians: every regular soldier had been sent from the Province to Lower Canada to suppress a rebellion there, but Upper Canadians them-



selves crushed the little affair in their Province. "England," *i. e.*, the Administrators in London, had been misled by the one-sided reports of the Colonial Governors: rebellion awakened her to the fact that all was not well in the Colony: she sent out one of the wisest of statesmen of the time or any other time, of Britain or of any other country, Lord Durham; and he after careful investigation recommended a union of the two Canadas and Responsible Government—and that was effected in 1840.

What is Responsible Government? No one "*qui haeret in cortice*," can understand it. The British Empire furnishes the most amazing instance of camouflage the world has ever seen—it is not even an Empire. Everyone will remember the saying that the Holy Roman Empire was so-called because it was not Holy, it was not Roman, and it was not an Empire. There is a King "by the Grace of God" whose glory and pride it is to be King by the grace of an Act of Parliament "broad-based upon his people's will"; by law necessarily a Protestant he is "Defender of the Faith" because his ancestor the much-married Henry was so decorated by the Pope for defending against Luther, the Faith of the Roman Catholic; with all the titles and prerogatives of a Norman or a Plantagenet, Master of Army and Navy, he cannot appoint a Lieutenant or a Midshipman; with all the millions of the British world to look to he must select as his Ministers those selected for him by the House of Commons—a *congé d'élire* in the secular world. In a word, the King reigns but does not rule, therein differing from a President who—but that is another story.

Stripping off the vesture and getting down to the real, the people elect a House of Commons, the House of Commons by an informal process, no less real from sometimes being obscure, selects the Ministers—the Ministers are responsible to the House of Commons and not to the Executive, as in the United States—and when the House of Commons says, they must go.

That was the system in substance introduced into Canada in 1840-41. There was, indeed, here and there a check reserved by the Home Administration: the recommendations of the Home Government were not only respectfully considered but even occasionally sought by the Canadian Government, and the Governor was a real power.

In 1867, the Canadas, Nova Scotia, and New Brunswick united in one Dominion of Canada—the form was an Imperial Statute, the reality a Union agreed upon by the statesmen of the different Colonies. A wider union was thus formed, but there was no substantial change in the status in other respects. That is no



change in *form*—there were precisely the same provisions in the written law, and the King or Queen “by the Grace of God” could reject any measure passed by the Dominion Parliament—a few had been rejected under the Union Act of 1840, and the *law* was the same.

In the first Session of the Dominion Parliament 1867, a bill was passed reducing the salary of the Governor-General: this was disallowed by the Home Administration—but since that time there has been nothing of the kind. In *form*, the King through his responsible Ministers at Westminster can disallow any Canadian legislation. So he can any Imperial legislation; but no King has refused his assent to British legislation since William III; and there has been no interference with Canadian legislation for more than half a century.

What would happen if the Old Land should attempt to *rule* Canada or to annul her legislation? I do not know any more than I know what would happen if the present College of Electors were to exercise their undoubted legal right and elect as President an illiterate, full-blooded Georgia negro—the one is quite as likely as the other.

Once indeed, there was a determined and united effort on the part of a very important and influential section in England to direct our fiscal policy. In 1878, Canada decided upon a Protective Tariff, the so-called “National Policy”: the British manufacturers complained bitterly of the evil effects of this tariff upon British trade; both they and Canadian opponents of protection urged that it would prejudice “British connection”—the leader of the Government, the man who previously sang “A British subject I was born, a British subject I will die,” did not hesitate to say openly in the House of Commons, “So much the worse for British connection,” and there was no effective reply. We govern ourselves.

Thus far Canada took no part in the affairs of the rest of the British world: she had all she could do to manage her own business and followed Nehemiah’s plan of attention “every one over against his house.”

In 1887, Canada with the other self-governed Dominions was invited to a conference on affairs affecting the whole British Empire: the first Colonial Conference composed of the Prime Minister of Britain and the Prime Ministers of the Dominions met in that year at London and conferred on Empire matters. Few understood the significance of the Conference: it meant that Canada was stepping out of her geographical bounds and having

her say in world affairs. In 1897, a further advance was made—Canada in her fiscal policy decided to reduce the tariff on goods of British manufacture: Britain had treaties with Germany and Belgium entitling these countries to the most advantageous tariff in Britain and her dependencies. Germany and Belgium protested the Canadian tariff. In strict law Canada was a dependency of Britain: notwithstanding the epithet of “Perfidious Albion,” given to Britain by the baffled Corsican, Britain has no record of broken treaty—no scrap of paper episode; the treaty was in existence and Canada loyally observed it.

But when the Prime Minister of Canada went to the Colonial Conference, he insisted that the obnoxious treaty should be denounced, and denounced it was. Germany put a surtax on Canadian products, Canada countered with an excess tariff, and Germany came down—we can worry along without Rhine wine and German dolls.

Now Canada takes part in the general policy of the Empire. In 1907 the value of the Conference had become manifest: but the word “Colony” and its adjective “Colonial” were outworn—we had passed far beyond the colonial stage and while we were of the Empire we were tired of the epithet Colonials which seemed to argue inferiority. Accordingly, in 1907, when the Conference of Prime Ministers was systematized and made perpetual, the name was changed to “Imperial Conference”—the Conference of the Empire.

Then came the War and in the very earliest days Canada dedicated herself, her men, and means to fight the battle of freedom and democracy. She did not wait for her sons to be slain or her commerce to be interfered with, but at once said, “The last man, the last dollar.” Since Canada was Canada, Canadians have fought and bled under the blood-red banner, from Waterloo and before to the Canadian Williams’ defense of Kars, on every field on every sea Canadians have taken part—in 1884 Canadians fought their way up the Nile in the forlorn hope to relieve General Gordon, in 1900–01 Canadians fought in South Africa—these were Canadians, but they were not properly Canadian troops. Britain paid them, they were British troops. But in this War Canadians fought as Canadians, or Canadian troops, raised by Canada, paid by Canada, looked after by Canadian doctors and Canadian nurses. How they fought I need not tell—the world knows. Are Americans satisfied that these soldiers, while Canadian to the finger tip, British to the last drop of their blood, not wishing to be considered or called Americans, boast of being American?



The War raised questions of the most serious import to all the self-governing Dominions—how was the War to be conducted? With what ends? Where were the troops to be sent?

In 1917, these and similar questions became acute, the situation was grave. Accordingly, in this year a War Cabinet was formed composed of the Prime Ministers of all the self-governing British world.

Sir Robert Borden, the Prime Minister of Canada, addressing a British audience said:

"A very great step in the constitutional development of the Empire was taken . . . by the Prime Minister when he summoned the Prime Ministers of the overseas Dominions to the Imperial War Cabinet—we met there on terms of perfect equality . . . we went on . . . to complete fiscal control and the negotiation of our own treaties. But we have always lacked the full status of nationhood because you (in Britain) exercised a so-called trusteeship under which you undertook to deal with foreign relations on our behalf and sometimes without consulting us very much. Well, that day has gone by: we come here, as we came last year, to deal with all these matters on terms of perfect equality with the Prime Minister of the United Kingdom and his colleagues. . . . Every Prime Minister who sat at that Board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our Imperial Commonwealth."

This statement of fact—not of theory—is accepted by every British statesman.

When the War was over and the Armistice signed, the representatives of the nations which fought against Germany sat round a Council Board. Canada demanded a place, as did Australia, New Zealand, and South Africa—and the claim was allowed. The ill-informed and the Anglophobe imagine, or at least say, that Britain asked that these nations should have a place—it is not true. Britain would have been quite content to appear for all the British Empire; but Canada would not have it or Australia or any other British nation. The blood of their sons, the sacrifice they had made entitled them to a say in the time of peace and in the future of the world, they insisted upon it and had it. Nay, more; when the United States and Great Britain had no word against Japan's claim to race equality, it was Australia who by her representative blocked the claim, Mr. Hughes serving notice that if such a claim were allowed he would withdraw from the conference. Canada's function in that regard is known to all who care to know: it is to be one of the most serious matters for discussion at the impending Assembly of Nations (from which, of course, the United States will be absent). Canada will be there.

We have for years made our own arrangements with the



United States, in *form* through the British Minister. But now we are going far beyond that: a Canadian Minister is to be placed at Washington to attend to all Canadian matters—perhaps the official statement will be sufficiently complete for the present purpose. It reads:

“As a result of recent discussions, an arrangement has been concluded between the British and Canadian Governments to provide more complete representation of Canadian interests at Washington than has hitherto existed. Accordingly it has been agreed that His Majesty, on the advice of his Canadian Ministers, shall appoint a Minister Plenipotentiary, who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government.

“In the absence of the Ambassador the Canadian Minister will take charge of the whole Embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with necessary powers for the purpose. This new arrangement will not denote any departure either on the part of the British Government or the Canadian Government from the principle of the diplomatic unity of the British Empire.

“The need for this important step has been fully realized by both Governments for some time. For a good many years there has been direct communication between Ottawa and Washington, but the constantly increasing importance of Canadian interests in the United States has made it apparent that in addition Canada should be represented there in some distinctive manner—this would doubtless tend to expedite negotiations and, naturally, first-hand acquaintance with Canadian conditions would promote good understanding.

“In view of the peculiarly close relations that have existed between the people of Canada and those of the United States, it is confidently expected as well that this new step will have the very desirable result of maintaining and strengthening the friendly relations and co-operation between the British Empire and the United States.”

The appointment of the Minister is temporarily held up; but it is recognized on all hands that the matter is a Canadian question and it will be settled by Canadians and on Canadian grounds alone.

I have read many articles in the American Press concerning this new movement and I have not yet seen one adverse comment—even those papers which approved the Senate’s condition of accepting the Treaty that Canada should not be admitted to the Assembly of Nations on a par with Hayti, approved the project whereby Canada asserted her nationhood.

No one who is bound by the letter can understand five separate and free nations under one flag—it is the advantage and glory of an unwritten constitution that a course of evolution may proceed so as to revolutionize the original constitution without wrenching the external form. The British Empire as it exists today is a

triumph of just such an evolution—no race but Anglo-Saxon-Celts could have produced it, none but English-speaking peoples could understand it, love it, glory in it. There will be some legislation to bring the letter more in accordance with the fact and the spirit—that will be decided upon in an Empire Congress to be held at no distant day; in the meantime the fact remains immovable and unchangeable.

Those who believe "England" always and everywhere a tyrant and the foe of liberty will not understand that at every stage in Canada's career "England" has gladly welcomed her approach to self-government; and is as proud of her history and her present status as Canadians themselves; one Bunker Hill was enough.

We offer our friendship to the United States: we desire the friendship of the United States—we do not beg for it. Canada can, if she must, stand on her own feet and rely upon her own resources, but we value beyond rubies the good feeling between the two countries.

Whatever may be said by unwise politicians, that good feeling cannot be modified for the worse by Canada's new status; but come what may Canada will not go back to her colonial position and she will not cease to be British.

Osgoode Hall,  
Toronto, Nov. 8, 1920.

# BOSTON UNIVERSITY



## LAW REVIEW

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# BOSTON UNIVERSITY LAW SCHOOL

**Some Facts stated at the Law School Association  
Annual Dinner March 31, 1921**

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Among the graduates of Boston University Law School are:—

5 Justices out of the present seven Massachusetts Supreme Court Justices  
(including the Chief Justice).

12 Judges out of the present twenty-nine Massachusetts Superior Court  
Judges.

11 Justices of the Supreme Courts of the several States.

150 Judges of various State Courts.

\* \* \* \* \*

17 United States District Attorneys and Assistants (Federal Courts).

30 State District or County Attorneys and Assistants (Federal Courts).

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The Boston University Law School has matriculated also five Students  
who subsequently became State Governors:—

3 Governors of Massachusetts.

2 Governors of New Hampshire.

## ABUSES

BY WILLIAM RENWICK RIDDELL<sup>1</sup>, LL.D.,  
FR. HIST. SOC., ETC.

The "very ancient and learned treatise of the laws and usages of this kingdom . . . the title of which" is "the Mirror of Justices," that "ancient treatise of the Mirror of Justices" of which Sir Edward Coke spoke so highly<sup>2</sup>, did not retain the great reputation which Coke thought it deserved. Whatever credit it may have had with him as embodying "holy customs since the time of King Arthur," it could not stand the historical criticism of Reeve<sup>3</sup> and other historians of our law—the Selden Society's edition, 1895, finally stripped it of every vestige of authority.

Sir Frederic Maitland in his introduction to that edition truly says: "It would be long to tell how much harm was . . . done to the sober study of English legal history" by Coke's opinion of this book—"the right to lie he (i. e., the author) exercises unblushingly."<sup>4</sup> "What . . . shall we say of this book and what shall we call the author? Is he lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all, perhaps, but the romancer seems to predominate."

Apparently the book was compiled toward the end of the 13th Century, probably 1285-1290,<sup>5</sup> by an intelligent layman, whether Andrew Horn, fishmonger of London, or some other: and while it is useless or nearly useless as an authority as to the actual laws at the time or previously, it is of great importance as showing what one intelligent man thought was the law. But still more important perhaps, at least more interesting, is the list of "Abuses of the Common Law", Book V. The Selden Society deserves our thanks for publishing the Mirror in a worthy form—their edition must displace that of 1646<sup>6</sup> (translation by William Hughes) and of the reprints of 1768 and 1840. The purpose of this paper is to mention a few of the abuses of which the author complained in the time of the Plantagenet, Edward I.

Many of these abuses are now outworn. "1. The first and sov-

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<sup>1</sup>Justice of the Supreme Court of Ontario; one of Canada's most eminent living jurists and legal historians and also celebrated not only as a distinguished author but as a brilliant orator.—ED.

<sup>2</sup>See the introductions to Books ix and x—Coke's words are quoted.

<sup>3</sup>See Reeve's *History of English Law*, Vol. ii, pp. 358, 359.

<sup>4</sup>Maitland instances particularly the myth of King Alfred hanging forty-four false judges in one year, which he justly calls a "daring fable."

<sup>5</sup>Possibly a little later.

<sup>6</sup>I have a copy of this the first edition in English—it is a 12 mo. of 325 pages. The first printed copy (in Norman French) was published in 1642.

ereign abuse is that the King is beyond the law (*outré la loi*) whereas he ought to be subject to it, as is contained in his oath"—this disappeared with James II, and never since has the King of England been "*outré la loi*."

The shameful treatment of prisoners is now a thing of the past, but then "52. It is an abuse that gaolers despoil prisoners" . . . "53. It is an abuse that prisoners or others on their behalf should pay anything on entering or leaving gaol."

Prisoners without powerful friends were unmercifully despoiled long before the Statute of (1605) 3 Jac. 1, c.10 made offenders legally liable for the expense of conveying them to prison, while the extortion of civil prisoners was notorious.

"14. It is an abuse that a man who has committed homicide of necessity or for the peace or in self-defence is taken or detained until he has purchased the King's charter of pardon just as though it were a case of misadventure." The author is apparently speaking of the second kind of Excusable Homicide mentioned by Blackstone (*Comm.*, Book iv, p. 182), i. e., Homicide in self-defence, *se defendendo*, and comparing it with the first kind of Homicide *per infortunium*—he cannot be speaking of the necessary "killing of a thief or malefactor" (p. 187). The necessity which excuses killing, *se defendendo*, Bacon calls *necessitas culpabilis*: and at the Common Law the slayer in no case was held free from guilt. Such a killing originally involved the offender in forfeiture of goods, but, as far back as any records go, he was entitled as of right to a pardon and restitution on paying the fees therefor. And judges gradually introduced the practice of allowing a verdict of not guilty—when judges became less dependent upon the Crown, they were less careful of having fees paid to the Crown.

The author does not see any abuse in compelling those who slay *per infortunium* to take out a charter of pardon<sup>1</sup>. "19. It is an abuse that justices drive a lawful man, 'loial home,' to put himself upon his country when he offers to defend himself against an approver by his body." An approver is one who pleads guilty of a crime, but charges another with being party to it—in the ancient law, the two fought a judicial battle, and he who lost was hanged out of hand. The judges always tried to have a jury trial instead of a judicial combat, and therefore tried to induce—apparently sometimes forced—the accused to put himself upon his country and be tried by a jury. The Mirror approved the good old rule.

"29. It is an abuse that those of the Exchequer and

<sup>1</sup>There are several instances of such pardons being sued out in Upper Canada (Ontario), but the Governor early put an end to the demand by the Provincial Secretary for a fee on such pardon.



others receive attorneys . . without original writ from the Chancery . . .”

“102. It is an abuse to receive an attorney where there is not a *dedimus potestatem* from the Chancery.” “Abusion est a recevoir a torne ou nul poer nest donée a ceo fere par brief de la chauncellerie.”

Attorneys are wont to consider their order a natural and necessary part of a court; and they may forget that the Common Law of England required the appearance in person of litigants, civil or criminal. We still require the personal appearance in Court of the defendant in criminal matters, but in civil cases the litigants generally come by attorney.

The first exception to the rule that civil litigants must appear in person was a permission by grant under the Great Seal to favoured persons to make an attorney to appear for them.

The first known statute on the subject was that of 1266, 20 Henry III, c.10, which allowed every freeman owing suit to the County Trything, Hundred and Wapentake, or to the Court of his Lord “freely to make his attorney to do those suits for him.” This did not help litigants in the Royal Courts. The statute of Westminster the First, 1275, 3 Edward I, c. 42, put an end to the intolerable nuisance of repeated essoins (i. e., excuses for non-appearance) of tenants by ordaining that once a tenant had appeared, if he was to be no further assoined, he must appoint an attorney to act for him. It was, however, the statute of Westminster the Second, 1285, 13 Edward I, c. 10, which gave the general right to be represented by attorney to those who had land before the Justices at Westminster in the King’s Bench, the Assize Court, Sheriff’s Court and Court Baron. This was the state of the law when the Mirror was written—and the author does not intend to find fault with the statute; this is shown by the fact that he later notes some objections to cap. 10 of the statute, but not to the provision for representation by attorney. His complaint is against the Exchequer and other Courts not authorized to receive litigants by attorney doing so without a writ from Chancery. Apparently the law was later developed that any court might admit or reject attorneys at its own discretion: *Cottier v. Hicks* (1831), 2 B. & Ad. 673. To continue the story of the attorney—the Statute of (1299) 27 Edward I, St. 2, gave such as were unable to travel or as dwelt far from the Chancery the right to have some sufficient man as an attorney. Before this, in the year 1292, we find entered on the Parliament Rolls a document which has been considered to be an Act of Parliament although it does not appear in the Statutes at Large—this contained an order from the King to John de Meting-

ham<sup>1</sup> and his fellows the Justices of the Court of Common Pleas to select in each county a certain number "de melioribus et dignioribus et libentius addiscentibus" to be attorneys and follow the Court.

After a number of special Statutes<sup>2</sup> came the Act of 1402, 4 Henry IV, c. 18, which provided that "all the attornies shall be examined by the Justices and by their discretion, their names put in the Roll and that they be good and vertuous and of good fame." These qualifications still are required at least in theory.

"39. It is an abuse that the fees of pleaders ("countours," "counters," barristers, counsel) are not fixed" ("mis en certain"). The lament is as loud in these days, as in the 13th Century, that certain lawyers demand excessive fees.

"38. It is an abuse that a free man should be elected to serve as the King's officer against his will." Public office is a public trust which should be thrust on no man against his will.

"11. It is an abuse that the King takes more than twelve pence on the change of every pound"—more than five per cent of an excise or inland revenue taxation is an abuse of power.

"5. It is an abuse that nowadays justice is delayed in the King's Court longer than elsewhere"—notwithstanding the promise in Magna Carta. "Nulli vendemus, nulli negabimus aut differemus rectum vel justiciam." This reproach is still applicable to most of the superior courts of the English speaking peoples—justice delayed is justice denied.

I quote but two more<sup>3</sup> of the 155 abuses, and these for their modernity.

"3. It is an abuse that the laws and usages of the realm are not put in writing so that they might be published and known to all." Codification, the glory of the Civil Law, is still looked upon with

<sup>1</sup>John de Metingham was one of the two judges—Elias de Beckingham being the other—who were alone found pure in the terrible exposure of the corruption of the Bench in 1289 by Edward I: he was made Chief Justice of the Common Bench in 1290 and presided as such until his death in 1301.

<sup>2</sup>I have counted some fifty acts respecting attorneys in the Statutes at Large up to the time of George III—one of the most amusing is that of 1455, 33 Henry VI, c. 7 (in Latin), limiting the number of common attorneys in Norfolk, Suffolk and Norwich to six, six, and two respectively—because of the practice of the eighty attorneys there residing "populum exortantes, procurantes, moventes et excitantes ad sectas minus veras . . ." and that because "majore parte ipsorum non habente aliquod aliud vivere sed solummodo lucrum suum per dictam occupationem attornatorum," i.e., "exhorting, procuring, moving and exciting the people to unfounded suits" because "the greater part of them had no other means of livelihood than the money made by the said occupation as attorneys"—something wholly unknown in these days.

<sup>3</sup>In certain cases by statute an action may in Canada be brought against the Crown for a tort.

The fiat of the Attorney-General to a Petition of Right has been considered almost of course. I say nothing of the refusal of an American sovereign state to submit to its own courts—is that, "abusion?"

alarm—or at least distaste—by many Common Lawyers. Some steps are being made year by year; and the time may not be far distant when the Common Law Provinces of Canada will have as beautiful and comprehensive Civil Codes as the Civil Law Province of Quebec—I say nothing of the Common Law States of the American Union.

“153. It is an abuse that one can have no recovery against the King or Queen for a tort save at the King’s will.” The Crown, the State, the People, are not liable in tort—and moreover even on a contract a fiat must be obtained for a Petition of Right.<sup>1</sup>

Perhaps I have written enough to induce students of law to read this old book.

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<sup>1</sup>In certain cases by statute an action may in Canada be brought against the Crown for a tort.



## HAMILTON'S IDEAS IN MARSHALL'S DECISIONS<sup>1</sup>

BY FRANCIS NEWTON THORPE,<sup>2</sup> PH. D., LL.D.

John Adams's appointment of Marshall as Chief-Justice of the United States, in 1801, an office which he held till his death in 1835, proved to be the enthronement of Hamiltonian ideas in the early and critical period of the nation's history. It is not difficult to conceive that, had the appointment fallen to Jefferson, a Chief-Justice imbued with Jeffersonian ideas of government would have been nominated,—and doubtless confirmed,—and a series of decisions, differing totally from Marshall's, would have been handed down. It must be admitted,—duly reflecting on the authority of Marshall's decisions,—that Jeffersonian democracy never has had an unrestricted field of operations in America.

The United States, as a nation, rests on fundamental principles; to define these principles, authoritatively, was the unique privilege of John Marshall.<sup>3</sup> The course of the American people, at the time of the Revolution, was problematical, whether toward confederacy or nationality. John Marshall, as a private citizen, as a member of the Virginia Legislature, as a representative of his country in France, as a member of Congress, as Secretary of State, as Chief-Justice of the United States, without deviation held to the national course; to no man is America more indebted for the first, clear, comprehensive statement of the true basis of its peace and prosperity. Convincing as was Marshall's exposition of the supreme law of the land, it was not, however, until the Civil War that the demonstration was complete that the United States is a *nation*, not a *confederation*. Two theories of government and administration, from the inception of American independence, divided public councils and private thoughts;

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<sup>1</sup>An address delivered before the Allegheny Bar Association, January 21, 1921, essentially as here given.

<sup>2</sup>Professor of Political Science and Constitutional Law, University of Pittsburgh; formerly Professor, University of Pennsylvania; Member of the Pennsylvania Bar; Member of the Constitutional Commission of Pennsylvania. He is the author of numerous published works, being best known by his various Constitutional Histories of the United States as well as by his *Essentials of American constitutional law*. His monumental work, *American charters and constitutions*, was cited as authority by the Supreme Court of the United States in the Draft Cases.—ED.

<sup>3</sup>"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right. \* \* \* \* It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must decide that case conformably to the

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## THE FIRST COURT OF CHANCERY IN CANADA

BY WILLIAM RENWICK RIDDELL, L.L.D., F. R. HIST. SOC, ETC.,<sup>1</sup>

Justice of the Supreme Court of Ontario.

The first Court of Chancery in Canada (I use the word in its historical sense) was in the old Province of Quebec, which was created by the Royal Proclamation of October 7, 1763, after the Treaty of Paris.

The distinction between Law and Equity is the glory—or the reproach—of England and those countries which derive their jurisprudence mediately or immediately from England; and Civil Law countries know nothing of it.<sup>2</sup> Accordingly, to speak of a Court of Chancery in the Province of Quebec seems almost an absurdity. When, however, it is remembered that from the promulgation of the Royal Proclamation of October 7, 1763, or at least from the Ordinance of September 17, 1764, to the coming into force, May 1, 1775, of the Quebec Act of 1774, the English Law was in some degree at least in force in the Province, the apparent anomaly of a Court of Chancery in Quebec disappears; and the reason appears why such a Court existed as it undoubtedly did exist for some years.

The Treaty of Paris concluded February 10, 1763, whereby Canada was ceded to Britain, provided by Article IV, that those who had been subjects of the French King might emigrate from Canada at any time within eighteen months of the exchange of the ratification of the Treaty.<sup>3</sup>

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<sup>1</sup>Justice of the Supreme Court of Ontario; one of Canada's most eminent living jurists and legal historians and also celebrated not only as a distinguished author but as a brilliant orator.—Ed.

<sup>2</sup>I use the word Equity in the legal sense, a "body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles," Maine, *Ancient Law*, p. 32. Of course I make no reference to the ancient Roman Praetors and their Edict.

<sup>3</sup>Much of the material for this paper can be found in splendid volumes *Documents Relating to the Constitutional History of Canada 1759-1761* . . . edited by Drs. Shortt and Doughty, in the Archives Series, Ottawa, 1918; the second edition is more valuable even than the first: the learned editors have placed all students

of Canadian Constitutional History under a very great debt of gratitude. For convenience I here give the reference to the documents made use of in this paper.

- p. 113—1763 Feb. 10—Treaty of Paris.  
 116— —Art. IV. gives Canadians, etc., right to go to France within 18 mos.  
 163— Oct. 7—Royal Proclamation.  
 173— Nov. 28—Commission to Murray, esp. pp. 175, 176.  
 181— Dec. 7—Instructions to Murray, esp. p. 188.  
 205—1764 Sept. 17—Ordinance estab. Civil Courts in Quebec.  
 237—1765 Sept. 2—Report of Com. for Plantation affairs, suggesting Ct. Chy., esp. 245.  
 249—1766 July 1—Ordinance re Courts.  
 251— Apl. 14—Report Atty. Gen. & So.. Gen. approving Ct. Chy., esp. p. 253.  
 287—1767 Dec. 24—Carleton's Despatch to Shelburne re case in Chancery, esp. pp. 289, 290.  
 301—1768 —Instructions to Carleton, esp. p. 307.  
 327—1769 Feb. 27—Maseres' Draft Report, esp. p. 348 (ignores Ct. of Chy.)  
 377— July 10—Reports Lords Commrs. Trade esp. p. 386 (ignores Ct. of Chy.)  
 401—1770 Feb. 1—Ordinance re Courts of Common Pleas.  
 424—1772 Dec. 6—Wedderburn's Report of proposed legislation, esp. p. 436.  
 437—1773 Jan. 22—Thurlow's Report.  
 445—1774 —Marriott's Plan, esp. p. 474 re Carleton's Despatch of Dec. 24, 1767.  
 549—1774 —Mansfield's (?) Criticisms of Draft Quebec Act, esp. 549, 550.  
 —1774 —Quebec Act, 14 Geo. III, c. 83 (Imp.)  
 594—1775 Jan. 3—Instructions to Carleton re Courts, pp. 599, 600, 601, 602, 613.  
 647—1774 —Chief Justice Hey's Draft Ordinance re Ct. Justice esp. pp. 647, 648, and see p. 585 n. 2.  
 672—1776 Aug. 1—Commission to Governor, Lieut. Gov. & C. J. as Ct. of Appeals.  
 674— July 23—Commission to Judges, Court of Common Pleas.  
 679—1777 Feb. 25—Ordinance re Courts Civil Judicature.  
 682—1777 Feb. 25—Ordinance re Civil Procedure.  
 742—1784 Nov. 24—Petition for House of Assembly etc., esp. p. 745, also p. 952, Feb. 4, 1788.  
 754— Dec. —Objections to same, esp. pp. 757, 761.  
 874—1787 Jan. 11—Proceedings Committee of Council on Cts. of Justice, esp. pp. 884, 885.  
 892—1787 June —Mr. Justice Panet's Paper, esp. pp. 892, 893, 896, 897.  
 900—1787 Jan. 5—Report Committee on Commerce and Police, esp. pp. 902, 903, 904.  
 — —Report of Merchants of Quebec.  
 915—1787 Jan. 23—Report of Merchants of Montreal, esp. p. 916  
 929—1786 Dec. 28—Merchants of Three Rivers, esp. p. 930.

There has been a great deal of confusion in respect of the law in the original Province of Quebec. After the conquest and before the Proclamation of 1763, there were military Courts which administered justice in most, if not all cases, by rule of thumb, and in accordance with their own sense of right. The Proclamation assured the new settlers the protection of the laws of England; but there does not seem to have been any change in the administration of Justice till the coming into force of the Ordinance of September 17, 1764.

The Chief Justice and Attorney General were sworn in August 10, 1764, and this was the beginning of the end of the Regime Militaire. Even after the Ordinance of September 17, 1764, it is by no means the fact that the laws of England prevailed everywhere.

On the contrary it may be stated that the laws of England were applied only in the Court of King's Bench. Neither by the term of the Ordinance, nor in practice, were the laws of England to be the rule of decision in the Court of Common Pleas: the Judges appointed at first in this Court were men ignorant of all law, and the practitioners before the court were chiefly if not altogether French. One of the



The Administration at Westminster did not await the expiration of the period; but almost immediately took into careful consideration the question of the future government of the new territory. The result was the Royal Proclamation of October 7, 1763, constituting (*inter alia*) a "Government of Quebec," comprised of Canada from the River St. John west to a line drawn from the south end of Lake Nipissing to the intersection of the St. Lawrence by the 49th parallel N. L. The Proclamation announced that power had been given to the Governor with the advice of his Council to erect and constitute courts of Judicature and public justice to hear and determine all causes "according to Law and Equity and as near as may be agreeable to the Laws of England" with an appeal to the King-in-Council, and the assurance was given that all might confide in the Royal protection for the enjoyment of the laws of England. This Proclamation has always been considered to have authorized if it did not actually effect the introduction into the Colony of the laws of England, civil and criminal.

General James Murray was appointed Governor in Chief in and over the Province of Quebec; in his Commission he was given full power with the advice and consent of his Council to "erect, constitute and establish such . . . Courts of Judicature and public justice . . . as you and they think fit and necessary for the hearing and determining of all causes . . . according to Law and Equity . . ." His instructions were very plain: "with the advice and consent of Our Council to constitute . . . Courts of Judicature and Justice"; and in that regard to "consider what has taken place in this respect in Our other Colonies in America, more particularly in Our Colony of Nova Scotia."

While no doubt, civil Courts could have been erected and the Regime Militaire terminated at once, it was thought advisable not to effect this result until after the expiration of the eighteen months allowed by the Treaty of Paris for French subjects to depart the country. On September 17, 1764, an Ordinance was passed at Quebec by His Excellency Governor Murray in Council, which created two Courts, one the Court of King's Bench with full civil and criminal jurisdiction to determine all causes "agreeable to the Laws of England and the Ordinances of this Province"<sup>4</sup> the other an "inferior

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Judges, a Surgeon, Mabane, said some years later, that he and his colleague Judge Fraser had applied themselves to the study of French law, from the moment they took their seats on the bench. Some of the difficulties arising from this double set of laws (especially as there was an appeal from the Court of Common Pleas to the Court of King's Bench) will appear later in the text.

<sup>4</sup>The Chief Justice was to hold a trial Court, "a Court of Assize and General Goal Delivery," once a year at Montreal and Three Rivers; these were, of course, ancillary to the Court of King's Bench.



Court of Judicature or Court of Common Pleas" with civil jurisdiction above £10 in which the Judges were to "determine agreeable to Equity having regard nevertheless to the Laws of England as far as circumstances and present situation of things will admit." This did not make the Court of Common Pleas a Court of Equity in our sense of the word; it was a Court of Law, but the Judges were often lax in their application of the rules of law. This Ordinance was submitted by the Privy Council at Westminster to the "Lords of the Committee for Plantation Affairs" for their consideration and report; they, September 2, 1765, advised the establishment of a Court of Chancery consisting of the Governor and Council "who should also be a Court of Appeals" and also a Superior Court of Judicature having the powers of the English Common Law Courts with ancillary trial Courts civil and criminal as well as Justices' Courts for small claims.<sup>5</sup>

At that time and for more than half a century later the high prerogative view enunciated by Blackstone<sup>6</sup> prevailed. "He (*i.e.* the King) has alone the right of erecting Courts of Judicature"; and "in the British West India Islands and some other ancient British possessions there were Courts of Equity exercising their authority on no other foundation than that the Governor was by Common Law, Chancellor, in virtue of his custody of the Great Seal."<sup>7</sup>

The principle was briefly this—the Statute of 1562, 4 Elizabeth, c. 18, s. 2, gave to the Keeper of the Great Seal all the powers of the Chancellor; entrusting the Great Seal of the Province to the Governor made him, *ipso facto*, Keeper of the Great Seal of the Province and consequently gave him the power of Chancellor.

This had been acted upon in Nova Scotia to which Province the Governor was by his Commission specially instructed to look for guidance.

The question of the formation of a Court of Chancery had not been neglected in the Colony. On October 23, 1764, the Attorney General was required by the Council to give his opinion "whether they can form themselves into a Court of Equity and to Report the Custom of the Province of Nova Scotia in that Respect and also the method of proceeding Therein." The Attorney General at the time

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<sup>5</sup>Up to £5 Quebec Currency (£4.10 sterling) one Justice of the Peace could try; up to £10, Que. Cur. two Justices and up to £30, Que. Cur. the Quarter Session—the Court of Common Pleas was intended Chiefly for the French Canadians.

<sup>6</sup>*Blackstone's Commentaries*, 1st Edit., Book I, p. 257.

<sup>7</sup>The words of Sir John Beverly Robinson, C. J. U. C., in *Simpson v. Smyth* (1846), 1 Grant, E. & A. R., 2, at p. 66; the judgment proceeds "but it seems to have been generally conceded that since the Bill of Rights, 1 Wm. and Mary, the Crown cannot by the exercise of its prerogative merely, erect any jurisdiction with power to judge otherwise than according to the course of the Common Law; and it has not of late years been attempted to do so." This is the "Constitutional" view.

was George Suckling, an English Barrister of no great standing, and not too attentive to his duties, who had been in practice in Halifax and a member of the first Assembly of Nova Scotia; on November 8, the Council directed him to be written to again "to give an account of the Court of Chancery in Nova Scotia and whether he did not think it necessary here, and if so, whether the Governor and Council had not a Right to sit as such in this Province." Suckling sent in a written Report dated at Quebec, November 1, 1764, but apparently not received by the Council until November 8, in which he gave an elaborate account of the Court of Chancery in Nova Scotia. He answered the two questions as to the necessity of such a Court and the right of the Governor and Council to sit as one, thus: "I apprehend a Court of Chancery is the Subject's Birthright and I do think it ought to be opened in this Province for the Decision of many import(ant) Affairs and as to the last Question whether the Governor and Council have a Right to Sitt as such Here. I am of Opinion that His Excellency the Governor by the Delivery of the Broad Seal to Him hath the same Place, Authority, Jurisdiction and Execution of the Laws as any Governor or Chancellor in the Plantations Hath or ought to have for he is Constituted by the Delivery of the Broad Seal to Him and taking the Oath And I ground my opinion of this Point upon 5 Eliz. c. 18; 4 Inst. 87, And the Custom of His Majesty's Council Setting with the Governor of Nova Scotia in the Chancery Was only as I suppose from a View of having their Advice and Assistance in all Matters of Weight and Difficulty." It will be seen that Suckling considered 1—that the Governor had the right by the mere delivery to him of the Great Seal to sit as a Court of Chancery without any Act or Ordinance, and 2—that the Council if it sat with him would not form any part of the Court, but be present to advise the responsible Chancellor if required, he having not only the right, but also the duty to exercise his own judgment—in other words the decisions were to be decisions of the Governor, not of his Council.

Upon this opinion being read the Council, November 8, 1764, ordered it to be entered in the Council Book "and that the Governor having required it, should have the assistance of his Council when he sat as Chancellor." A direction was also given that Commissions should be made out for "the Honble. Benjamin Price and Thomas Dunn as Masters in the said Court of Chancery and the Honble. Adam Mabane and Fras. Mounier as Examiners and Hen. Kneller, Register in the same."

No Ordinance was passed erecting a Court of Chancery; and it is clear that this Court did not rest upon any British or Colonial legislation but upon the supposed Royal Prerogative whereby the King



by the delivery of the Great Seal of any Province thereby created its custodian Chancellor with full power of sitting as a Court of Equity.<sup>8</sup>

<sup>8</sup>The proceedings will appear in the following:

"EXTRACTS FROM LEGISLATIVE COUNCIL BOOK A

1764, Oct 23—Ordered that the Attorney General be immediately required to give in his opinion to the Council whether they can form themselves into a Court of Equity and to Report the Custom of the Province of Nova Scotia in that Respect and also the method of proceeding Therein.

1764, Nov. 8—Ordered upon the Motion of the Honorable Adam Mabane that the Clerk of the Council should write a second Letter to the Attorney General requiring him on the Receipt of it, to give an Account of the Court of Chancery in Nova Scotia, and whether he did not think it necessary here, and if so, whether the Governor and Council had not a Right to sit as such in this province.

Nov. 8—The Attorney General's Opinion relative to a Court of Equity, etc. in this Province was produced to the Board and being read, it was ordered to be entered fairly in the Counsel Book, and that the Governor having required it, should have the Assistance of his Council when he sat as Chancellor.

Ordered likewise upon the Opinion following that proper Commissions be made out for appointing and swearing in the Honorable Benjamin Price and Thos. Dunn as Masters in the said Court of Chancery and the Honorable Adam Mabane and Fras. Mounier as Examiners and Hen. Kneller Register in the same."

The following is the opinion of

"ATTORNEY GENERAL ON COURT OF CHANCERY.

Quebec, 1st November, 1764.

"May it please Your Excellency and Honours.

I am honoured with your Commands signified to me by John Gray Esq., D. C. C. relating to the Court of Chancery in Nova Scotia for me to give a particular Account thereof as it is now commonly held and the manner of proceeding there. And whether I think such a Court is not absolutely necessary here in the present Situation of Things. And whether the Governor & Council have a Right to sitt as such here. In Answer to which I beg leave to observe that during my Residence in that Province. Where any Person had a Matter of Dispute cognizable in a Court of Equity, the Party Complainant applyed by Petition to the Governor praying that a Day might be appointed for a Court of Chancery to sit for the Dispatch of Business which was always granted. And the Day appointed, being commonly 16 or 17 Days from the Delivery of the Petition, in which Time the Complainant filed his Bill addressed to the Governor and Council as a Court of Chancery with the Register of the Court. If a Common Bill and then took out Process of Subpoena for the Defendant or Defendants to appear and answer Which being personally served and at the Return thereof An Affidavit made of such Service before a Master of the Court and filed with the Register, The Defendant was then supposed to enter his Appearance with the Register take a Copy of the Bill and pray a reasonable Time to put in his Answer, plead or Demur to the Bill But He Might at his Peril stand out all Process of Contempt even to a Sequestration for want of Appearance or after Appearance for Want of an Answer but this rarely happens. If the Defendant Answered or pleaded to the Bill he was to do it upon Oath before a Master and file it with the Register and if the Answer was unexceptionable the Cause was then either sett down to be heard on Bill and Answer; upon Motion of Complainants Council or if Complainants Council advised it the Cause descended to Issue and then a Commission was taken out for the Examining of Witnesses either before an Examiner of the Court or by *Dedimus Potestatem* to Commissioners struck by both Parties, or exparte as the Case happened to be Upon the Return of the Commission and Examination of the Witnesses in Writing closed up, the Complainants or Defendants Council moved for a Day for Publication to pass and for leave to take Copies of the Examinations And if nothing incidental happens a Brief is prepared for the Governor and both Partys Council and then a Day upon Motion of Council is appointed for hearing the Cause, At which Day Complainants Council opens the Cause, when he has



It has already been said that the Lords of the Committee for "Plantation Affairs" recommended the creation of a Court of Chancery consisting of the Governor and Council which should also be a Court of Appeals—this suggestion was submitted to the Imperial Law Officers, April 14, 1766. The Attorney General, Charles Yorke (afterwards Lord Chancellor for three days) and the Solicitor General William de Gray (afterwards Chief Justice of the Common Bench and Lord Walsingham) reported in favour of the proposition. They said "In all suits entertained before the Governor and Council or a Court of Chancery or Equity . . . the General Rules of Law and Justice must be the same as in other Courts . . . with the difference only that the relief is more compleat and specific and adapted to supply the Defects or allay the Rigor of those Rules." A draft Ordinance to

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done The Defendants Council enters upon the Defence which he must go through with at once, After he has done the Complainants Council Replys and closes the Arguments during the Course of the Debate the Council of either Side is not to be broke in upon or interrupted by the other side After which if no Collateral Matter intervenes, The Court either Orders a Reference to a Master especially if the Subject of Dispute is a Matter of Account or directs an Issue at Law to be tryed upon some remarkable point, or appoints a Day for giving Judgment When being attended by all Parties the Decree is solemnly pronounced and Costs ordered to be paid according to the Circumstances of the Case.

It often happens that the Council for the Complainant are of Opinion that the Defendants Answer is not full and sufficient Wherefore it is very Usual to take Exceptions to it which must be in Writing pointing out wherein the Answer is defective These Exceptions upon Motion by Council in Court are ordered to be referred to a Master of the Court who upon being attended by Council and Solicitors on both Sides, Reports to the Court, whether the Exceptions or any, and which of them ought to be allowed or Not. If the Parties are satisfied with his Report it is Confirmed upon Motion by the Court and the Defendant ordered to pay Costs and to put in a further and better Answer. And a Subpoena is usually taken out for that Purpose, Which further Answer being put in, may if there is Cause be excepted to as the First If either of the Partys are not satisfied with the Masters Report, Exceptions may be taken to it, Which upon Motion are Ordered to be Argued in Court Who determine upon the Matter as they find Cause.

"It often Happens in a Cause that incidental or Collateral Matter Intervenes which is disposed of by the Court either upon Petition, Affidavit or Motion as the Case may require.

There can be no Court of Chancery appointed to do Business until there be proper Officers appointed and Sworn Which must be Two Masters, One Examiner and One Register at least.

I apprehend a Court of Chancery is the Subjects Birthright and I do think it ought to be opened in this Province for the Decision of many import Affairs:

And as to the last Question whether the Governor and Council have a Right to sitt as such Here,

I am of Opinion that His Excellency the Governor by the Delivery of the Broad Seal to Him hath the same Place, Authority, Jurisdiction and Execution of the Laws as any Governor or Chancellor in the Plantations Hath or ought to have for he is Constituted by the Delivery of the Broad Seal to Him and taking the Oath And I ground my Opinion of this Point upon 5: Eliz: cap. 18, 4 Inst. 87. And the Custom of His Majesty's Council setting with the Governor of Nova Scotia in the Chancery Was only as I suppose from a View of having their Advice and Assistance in all Matters of Weight and Difficulty.

All which is humbly submitted to Your Excellency and Honours,  
By Your Excellency's and Honours most Obedient and most humble servt.

Signed: Geo. Suckling.  
Legislative Council Book A. p. 103."

carry out the proposed scheme for Courts with the alterations proposed by the Law Officers was prepared and sent out to the Colony with directions that the Governor and Council with the advice and assistance of the Chief Justice and the Attorney General should report (*inter alia*) "Whether any and what defects are now subsisting in the present State of Judicature."

Mr. Maurice Morgan was sent out to assist in the enquiry, December, 1767.

To digress for a moment—just about this time, December 24, 1767, the Lieutenant Governor, Carleton, wrote to Shelburne, Secretary of State, a letter, part of which has been misunderstood—he said "a few disputes have already appeared where the England Law gives to one what by the Canadian Law would belong to another. A case of this sort, not easy to determine, lies at present in Chancery. If decided for the Canadian . . . the uniformity of the Courts of Justice thereby will be still further destroyed, Chancery reversing the Judgments of the Supreme Court as that Court reverses those of the Common Pleas." This has been supposed by some to indicate that there was a Court of Chancery, which sat in appeal from the Court of King's Bench as the Court of King's Bench sat in appeal from the Court of Common Pleas. For example, the Advocate General (Sir) James Marriott in his "Plan of a Code of Laws for the Province of Quebec" 1774, says, "the governor and council as a court of equity reversing the decrees of the Supreme Court of King's Bench which reverses that of the Common Pleas" Carleton does not use the word "reverse" in the technical sense, but in the sense "does not approve" "does not follow"; the case in Chancery to which he refers (*Houdin v. Ord et al*) never was in either King's Bench or Common Pleas.

To resume—Carleton obtained reports from the Chief Justice William Hey and from the Attorney General, Francis Maseres, which with his own were handed to Morgan. Maseres prepared a very elaborate draft report for Governor and Council which was not accepted. Hey's report does not seem to be extant. There is, however, extant a document which is entitled "a view of the Civil Government and administration of Justice in the Province of Canada, &c." which has been attributed to Hey and also to Maseres. I think that neither of these was the author and that it is most probably the work of Morgan himself. It contains an elaborate and careful survey of the laws existing before the Conquest, the changes attempted, the applicability and acceptability of the laws of England to the Province, &c., and concludes with the opinion that the "great ordinance of the 17th of September, 1764, by which the English laws were introduced into the Province was originally null and void in itself and consequently that the French laws have never been legally abolished."



1 Lower Canada Jurist, Montreal, 1857, Appendix pp. 1-48, esp. p. 48.

In none of the available formal documents is the scheme of a Court of Chancery so much as mentioned. The same is to be said of the elaborate "Report of the Lords Commissioners for Trade and Plantations relative to the State of the Province of Quebec" of July 10, 1769.

The question (*inter alia*) of the proper "Judicatures" to carry the laws of Quebec into execution was again submitted to the Imperial Law Officers, neither Edward Thurlow, the Attorney General (afterwards Lord Chancellor) nor Alexander Wedderburn, the Solicitor General (afterwards Lord Chancellor as Lord Loughborough and Earl of Rosslyn) says anything of a Court of Chancery; Marriott, the Advocate General, speaks of it only in the language already quoted.

When it was proposed to pass the Quebec Act, restoring the former Canadian law in civil cases, a criticism was made (apparently by Lord Mansfield) which pointed out certain results which would flow from such a Statute; but there is no suggestion that a Court of Chancery should be erected—or continued to prevent such results.<sup>9</sup>

The Quebec Act, 1774, is equally silent. After the coming into force of the Quebec Act, the necessity of a Court of Chancery seemed to be gone. When according to the Royal Instructions to Carleton a new Ordinance concerning Courts of Judicature was to be framed, Hey the Chief Justice<sup>10</sup> in a draft prepared by him expressly provided for the abolition of the Court of Chancery, and for the vesting of certain equity powers in the Court of Common Pleas.<sup>11</sup>

There was, however, no mention in the Ordinances actually passed, February 25, 1777, of either Court of Chancery or of Equity powers.

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<sup>9</sup>The critic points out that by the Custom of Paris, masons, carpenters, etc. have a mortgage for their wages, etc. on the house they build—our "Mechanic's Lien"—that an Englishman who had bought the house for a valuable consideration and without notice, might be deprived of his trial "by a jury according to the good old forms & usages of the Realm of England, etc., etc."

<sup>10</sup>Hey was then in England, and in conference with John Pownall, Under Secretary of State for the Colonies, Can. Arch. M. 385, pp. 425, 490, 373.

<sup>11</sup>"And whereas the Governor and Commander-in-chief of the Province for the time being has been used to hear and determine causes in Equity and to pronounce, order and decree therein between the Parties in a Court called and known by the name, stile and title of the Court of Chancery held before himself as keeper of the public Seal of the Province the proceedings of which Court with the Delay and Expense incident to a Suit commenced therein have been very Burthensome to the Parties and are ill-adapted to the State and Condition of the Province . . . ; the section proceeded to forbid the Governor, Lieutenant-Governor or other Keeper of the public Seal of the Province to sit as Judge in any such Court of Equity.

But the Courts of Common Pleas were given jurisdiction in trusts, frauds, account, specific performance, discovery, etc. the special field of a Court of Equity.



The first reference of any importance to a Court of Chancery after the Quebec Act<sup>12</sup> is to be found in the Report of the Committee of the Council relating to the Courts of Justice in 1787. The English speaking Merchants (or most of them) of Quebec, Montreal and Three Rivers had expressed themselves in favour of a Court of Chancery<sup>13</sup> in language which makes it fairly apparent—at least as regards those of Quebec and Montreal—that they did not understand the nature of such a Court. The Committee of Council were not unanimous as to a Court of Chancery; they pointed out that “a Court of Chancery is essentially necessary to the English system to perfect the administration of Justice in civil cases and the exercise of this trust” was vested in the Governor and they presumed “no farther than barely to suggest that the subordinate officers for” this Court “remain to be appointed.” By a vote of 2 to 1, however<sup>14</sup> they sent to the Governor a paper in French by Mr. Justice Jean Claude Panet of the Court of Common Pleas showing that during the time of the French Rule there was no Court of Chancery in Canada, but that the Superior Council of Quebec had certain equity powers—“the people did not suffer much or rather they did not suffer at all from this lack of a Court of Chancery, seeing that litigants had the right to insist on being examined concerning facts and evidence in virtue of an Ordinance of Louis XV in the year 1667” which was of course wholly contrary to the English Common Law rule. Panet set out the Ordinance which concludes with the enactment that such examinations are to be had at the expense of the party asking them and that the costs cannot be recovered from the opposite party even if he be saddled with costs—another horror to an English lawyer.

We find no further attempt to erect a Court of Chancery in that part of Canada.

It is now time to turn to the proceedings of the Court of Chancery

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<sup>12</sup>I pass over as not germane to the present purpose the petition, November 24, 1784, of certain English-speaking inhabitants that appeals from the Quebec Courts should be heard by the Lord Chancellor and twelve Judges at Westminster, the protest against that petition by French-Canadians, December, 1784, and the peremptory refusal of the Petition, February 4, 1788.

<sup>13</sup>Those of Quebec “A Court vested with Constitutional powers . . . to determine causes in Equity by an easy process avoiding as much as possible dilatory pleas with convenient dispatch and very moderate Fees and expenses will tend to grant relief to those who actually suffer or think they do so, under the rigour of legal decisions in particular cases. A Court thus constituted, in which one or more able professional men should have a seat is a very desirable establishment and what this Province has been deprived of and many to their great concern have felt the want of, since the year 1775.”

Those of Montreal—“A Court of Chancery would be a very desirable object if it could be so constituted as to grant relief against the rigour of legal decision with convenient despatch and moderate fees.”

Those of Three Rivers—“The Establishment of Appeals and a Court of Chancery.”

<sup>14</sup>Mr. Justice Adam Mabane and the French Canadian Paul Roque St. Ours against Hugh Finlay Deputy Postmaster General.

at Quebec; these from 1765 to 1770 appear in a small volume now in the Archives of Canada at Ottawa.

John Hay and Gilbert Barkly<sup>15</sup> were merchants carrying on business in partnership from 1756 or sooner and were at this time in Quebec. Hay filed a Bill in Chancery to take the partnership accounts<sup>16</sup> and Murray sat in Chancery for the first time on Friday, the 25th January, 1765 at Quebec. Hay was represented by George Suckling, the Attorney General of the Province and Barkly by a solicitor whose name does not here appear, but later on Mr. Morison is mentioned as his Counsel. Suckling read the Bill and asked for a writ *Ne exeat provincia*<sup>17</sup> against Barkly—this was refused as op-

<sup>15</sup>John Hay was a merchant in Quebec—he prayed for a lot of land and the ruins of the Magasin du Roy, April 9, 1764; he appears as one of the signers in Quebec of the celebrated petition of November, 1784, of the "Old Subjects" (i.e. the British and American occupants after the Conquest in 1759-60) for a House of Assembly. Barkley was a merchant in Philadelphia who did business in Partnership with Hay; he must at this time have been in the Province, otherwise the writ *Ne Exeat Provincia*, could not issue.

<sup>16</sup>This probably involved a dissolution of the partnership but not necessarily so. *Loscombe v. Russell*, 4 Sim. 8; *Fairthorne v. Weston*, 3 Ha. 387; *Wollworth v. Holt*, 4 My. & C. 619.

<sup>17</sup>The English Writ *Ne exeat Regno* corresponded in the Court of Chancery to the Common Law Writ of Arrest—it was a kind of equitable bail and was very common in actions of Account. In Canada the writ was called *Ne exeat Provincia*, was generally used in suits for alimony, and later was called (in Upper Canada) a Writ of Arrest.

The entry in the Proceedings Book reads *ne exeat provinciam*—but, then, "*Rex super grammaticam*."

The records are not signed until May 9, 1765, when for the first time we find the signature "Hen. Kneller, Regr" ("Regr" stands for "Register, not "Registrar" which word was little used for many years after this time). Kneller became Acting Attorney General of the Province in 1769: when Suckling was cashiered in 1766 he was succeeded by Francis Maseres and when Maseres went back to England, in 1759, Carleton appointed Kneller, interim Attorney General; he remained in office until his death in 1776, when he was succeeded by the well-known James Monk. Up to August, 1765, the record is in Kneller's handwriting, but when the sittings were resumed in 1768 by Sir Guy Carleton, another hand appears—that of "J. P." i.e. James Potts, Clerk of the Council.

James Potts, of Quebec, received a commission as Deputy of Murray in the Court of Vice-Admiralty at Quebec, 17 November, 1764; and a commission as coroner, vice Conyngham, on the 19th of April, 1766. He signs "Clerk of the Court of Appeal" on the 19th of April, 1766 (*In re John Ord et al vs. Capt. Lt. William Johnston*.)

"Jenkin Williams . . . was appointed Register in Chancery for Quebec Province in 1768-1775." Shortt & Doughty Const. Docs. 2nd Edit., p. 714, n. 1.—he made no entries in this book; the first entry made by Williams so far found was on November 6, 1770 in the suit *The King vs. Rene Cartier* spoken of later in the text. He was born in Wales and after coming to Canada was November 10, 1768 appointed Register in Chancery for the Province of Quebec, a post he occupied from 1768 to 1775; he was Clerk of the Council in 1777, Solicitor General, 1791, and Judge of the Court of Common Pleas at Quebec, 24 April, 1793; appointed Judge of the Court of King's Bench at Quebec, 13 December, 1794; member of the Executive Council, 7 January, 1801; member of the Legislative Council, 1 June, 1802. Was still living in Quebec in 1815. He had received a commission of barrister on the 5th November, 1768 and as has been said was appointed Register in Chancery on the 10th November, 1768. He petitioned Carleton, April 17, 1770 for pay, saying that he had not received any fees or emolument by virtue of his office and that some of the litigants were so miserably poor that they could make him no compensation—he had not charged the Government even with office rent. Can. Arch., Series S., Quebec, 1770.



pressive but on consent Barkly was ordered to enter into a recognizance of £1000 sterling to abide the decree of the Court.

Barkly filed a Cross Bill and asked to have Mr. Conyngham admitted as his solicitor in the former suit; this was refused.<sup>18</sup> In the Cross suit, at the second sittings of the Court, January 29, 1765, the Attorney General for his client Hay offered six gentlemen, Messrs. McCord, Lee, Gray, Rowe, Collins and Ord<sup>19</sup> as security to the

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<sup>18</sup>The record says that the motion to admit Conyngham as Barkly's solicitor was "opposed by Mr. Atty. Gen. and affidavit read thereon." The Solicitor who appeared for Barkly on the first day, almost certainly Morison, appeared also for him on this occasion and opposed the motion of the Attorney General for an injunction to stay Barkly's proceedings at law.

Williams Conyngham, of Quebec, appointed Clerk of the Peace, district of Quebec September 1, 1764; appointed Coroner, same district, same date; at the time of Barkly's application to appoint him Solicitor, he was not a solicitor or an attorney, not being made an attorney until March 23, 1765. He was discharged as Clerk of the Peace "for disobeying the Orders of the Justices and behaving unbecomingly in his office, for which reasons the Governor was pleased to give orders that Samuel Gridley, Esquire, or the *Custos Rotulorum* for the time being should grant the Clerks of the Peace their commissions in future. (Signed) J. Goldfrap, D. Sec'y."

On the 14th March, 1765, William Conyngham, Notary, drew Thomas Walker's protest against certain resolution entered into by Governor Murray.

In a letter to the Lords of Trade, dated the 15th of July, 1765, Gov. Murray writes of Conyngham's character: "The Minutes of Council, the Attorney General's memorial and Mr. Walker's protest against Government will sufficiently point out to Your Lordships the necessity of stopping Mr. Cunninghames' career, to publish all the iniquitous conduct of that practitioner of the law, would too sensibly affect the Chief Justice, a point I am very tender of for obvious Reasons, of this Mr. Cunninghame was no doubt sensible, & therefore had the confidence to demand a publick hearing, which has been refused untill Your Lordships' pleasure is known, after having examined what Mr. Price has to say on the subject: some of the Factions have been prevailed upon to sign a Petition in favour of this Cunningham with a View, no doubt, to complain to Your Board." Conyngham was appointed an Attorney at law, 23 March, 1765; he was dismissed as Coroner on the 19th of April, 1765. The Cross Bill of Barkly is in the Archives, it is addressed to "His Excellency the Honble James Murray, Captain General and Governor in Chief of the Province of Quebec, etc., etc., and the Honble the members of His Majesty's Council as a Court of Chancery for the said Province"—it is probable that the Bill was in the same form. Apparently it was thought that the recommendation of the "Lords of the Committee for Plantation Officers" mentioned in the text had been carried out; but it is quite certain that the Governors always sat alone and that the members of the Council had nothing to do with the Court except as advisers when asked for advice.

<sup>19</sup>John McCord from the North of Ireland, came to Quebec shortly after the Conquest and engaged in trade principally selling liquor by retail: he was granted a lot of land with the ruins thereon near the Intendant's Palace in 1760; he took an active part in the Petition by the English speaking inhabitants of Quebec in 1770 for a House of Assembly (p. 418)—in 1773 he called a meeting of the principal Protestant inhabitants at Miles Prenties' Inn, Upper Town, Saturday, October 30, and was elected President (p. 487) and a Member of the active Committee—, he took part in drawing up the Petition to the Lieutenant-Governor, Cramahe for an Assembly, November, 1773 (p. 493) and that to the King and the Memorial to Lord Dartmouth the following month (pp. 497, 501).

The Quebec Act of 1774 did not put an end to his activities he was one of the petitioners for its repeal, November 1, 1774 (p. 591)—also November, 1784 (p. 748) but does not appear thereafter, but he is known to have been in business as late as 1799.

John Lees had much the same views as McCord—he also was on the 1770 petition, the 1773 Committee, a petition in 1773 and 1774. He was a merchant at Quebec, in partnership with Francois Mounier a French Huguenot member of



amount of £8000 that his client should abide the decree of the Court, but insisted on the plaintiff Barkly finding sufficient security in the other action to the amount of £1000 that he would do the same. Both were sent to the Master for him to Judge the securities offered and to report.

(To be continued)

Murray's Council who had come from La Rochelle, France, and had been in business in Quebec for some years under the French Regime with his brothers Henri and Louis.

John Gray was a petitioner in 1773; he was Deputy Clerk of the Council, Secretary and Register of the Office of Enrollments, he received November 17, 1764, a commission to take oaths, etc.

Jacob Rowe was a petitioner in 1773 and 1784; he was a Quebec merchant, associated in trade with John Ord. He was in Quebec as early as January, 1762, and probably before. On the 10th June, 1765, he was granted a lot of ground in Quebec; appointed Deputy Provost Marshal for the district of Quebec, 1765 and occupied this post until 1776. On the 9th June, 1788, he asks for a pass to leave the Province.

John Collins was a land surveyor and a merchant in Quebec in 1760. He was appointed Deputy Surveyor General of the Province of Quebec on the 8th September, 1764, and he occupied this post until his death which occurred at his residence on St. Louis Street, Quebec, on the 15th of April, 1795. The following is a list of the commissions granted him during his career:

A J.P. for the districts of Quebec & Montreal, 24 August, 1764.

Commission of *Dedimus potestatem*, 7 August 1767.

" " " " 27th May, 1769.

New commission of D'ty Surveyor Genl. 2 May, 1775.

Member of the Leg. Council; took his seat at first meeting, 17 August, 1775.

Member of Carleton's *Privy Council*.

Com'n of General Gaol Delivery, 12 July, 1788.

J. P. Gaspé district, 24 July, 1788.

" Lunenburg " "

" Mecklenburg " "

" Hesse " "

" Nassau " "

Admiralty Com'n for the trials of certain offences committed at sea, 25th June, 1790.

J. P. For district of Trois Rivières, 6th July, 1790.

Com'n of General Gaol Delivery at Trois Rivières, 1st Sept., 1791.

Com'n of General Gaol Delivery Quebec, 5th Nov., 1791.

Appointed to Leg. Council of Lower Canada, 1792.

Was a Member of Committee of Council on Commerce and Police in the enquiry as to the state of the Province instituted by Lord Dorchester in 1786.

Dr. Alexander Fraser says in the "Ontario Archives Report for 1905," that Collins was an ardent Freemason and that he founded in 1787, St. James Lodge in the Kings Rangers at Catarqui, John Ord a merchant of Quebec in business with Jacob Rowe joined in the petition of the Quebec Traders.

"Your Majesty's most faithful and Loyal Subjects, British Merchants and Traders" in 1764 asking for civil government, a House of Assembly, etc., complaining of the Governor Murray as a discountenancer of the Protestant religion, etc., etc. Murray got back at them by saying that they were "Licentious Fanatics," whom nothing would satisfy "but the expulsion of the Canadians who are perhaps the bravest and best race upon the Globe." Ord seems not to have taken any part in the subsequent petitions.

# GERMAN TAXATION AFFECTING FOREIGNERS IN GERMANY AND GERMANS OUTSIDE OF GERMANY

By CARL G. GROSSMANN,<sup>1</sup> DR. JURIS

A tendency in the development of the world's relations including in no small degree this country, is that of intertwining and interweaving the financial structures of the civilized countries, as we are led to realize and to conclude from the events of the few years past, so that at present, finances and commerce of the nations seem to form what may be called "a system of inter-communicating vessels." As a consequence of this interrelation and intercommunication, the problem of foreign investments has become more and more acute and of practical importance. With this problem is closely connected, on account of its great influence, the question of foreign taxation, or expressing the thought in other words, the extent to which a country taxes property and income of persons who are not citizens of that country, and furthermore, the extent to which that country taxes property and income of its citizens that may be owned or received outside of the country. The study of these questions would assist in arriving at an understanding of the possibilities of so-called "double taxation" that may arise in cases of this kind. In the German tax regulations there is construed a rather elaborate and complicated system in reference to the subject mentioned. It is my opinion that an examination thereof may render valuable assistance in the comparison of the tax laws of the various countries and as a result thereof contribute on its part towards the solution of the international problem of "double taxation" which in the interest of the development of international commerce and trade is to be desired and hoped for.

A rule of taxation generally recognized, is the so-called "principle of domicile" which means that an individual or a body corporate is taxable in the first place in and by that country or place where it is residing, domiciled and/or seated. In all the cases where this principle is deviated from, as for instance, in respect of real estate and, under German law, also in respect of certain classes of property invested in a commercial enterprise, double taxation usually is the result. For, on the one side the country of the domicile of the individual or of the

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<sup>1</sup>Formerly of the German Bar, now in practice at N. Y. as an expert on German and Austrian law, associated with Carl L. Schurz, Esq. Author of various books and articles on German commercial and taxation laws, published in the United States and Germany.—Ed.

# BOSTON UNIVERSITY



## LAW REVIEW

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## THE FIRST COURT OF CHANCERY IN CANADA

BY WILLIAM RENWICK RIDDELL, LL.D., F. R. HIST. SOC, ETC.,<sup>1</sup>

Justice of the Supreme Court of Ontario.

(Continued from October, 1922)

Barkly had brought an action at law against Hay; the Attorney General unsuccessfully moved for an injunction against his proceeding with the action—then the parties agreed each to choose three persons and to leave all matters in dispute to them. February 2, the draft Arbitration Bonds were produced in Court, neither party would agree to them and the proposed arbitration was off “so determined to abide the event of the Suit.” A week after the Attorney General’s application for an injunction restraining Barkly proceeding at law was successful—he also moved for a writ of *Ne exeat Provincia*, which was ordered to issue unless Barkly gave security in £1000 sterling to abide the event.

March 27th, Counsel for both parties appeared and the Court decided that the time of the commencement of the partnership should be determined before an order was made for production of books and it was referred to the Masters to report within 14 days. Benjamin Price and Thomas Dunn<sup>2</sup> were the Masters; they reported June 14, 1756, as the date of the commencement of the partnership and May 9, this report was confirmed on motion of Suckling, unless the defendant should except in five days. He did except, and May 15, was given a day, June 1, to argue his exception. This was, on June 1, enlarged for 14 days but no more “the Court being of opinion the said Gilbert Barkly ought to have no further Indulgence seeing there

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<sup>1</sup>Justice of the Supreme Court of Ontario; one of Canada’s most eminent living jurists and legal historians and also celebrated not only as a distinguished author but as a brilliant orator.—Ed.

<sup>2</sup>Thomas Dunn was a well known member of the Council from the beginning having been appointed by Murray in 1764; he became one of the Judges of the Court of Common Pleas at Quebec and was a successful and sensible Judge and councillor.

Benjamin Price became a member of the Council, October 31, 1766, and continued as such until his death.

is a regular Post Established between this City (Quebec) and Philadelphia and the carriage by water is so very uncertain and precarious." June 15, Counsel for both parties solemnly argued and debated "and the Court ordered Hay to produce to the Masters, books for 1756, 1757 and 1758 which he had not previously shown them so that they might report by June 18 what weight they should have in fixing the beginning of the partnership. June 18, the Master reported: June 19 the report was confirmed and Barkly was ordered to produce on oath to the Masters on or before July 10 all Books, papers "that are now at Philadelphia or at Quebec" and in his custody from June 14, 1756, to June 14, 1761 and a similar order went against Hay.

July 30, Barkly obtained an order that Hay should attend Thomas Dunn one of the Masters and Show cause why the reference should not proceed with on the books &c. already produced.

Governor Murray was recalled, April 1, 1766, and took no further part in this partnership suit; but August 2 1765, he had granted an injunction on the motion of the Attorney General, Counsel for A. P. Houdin against Ord, Rowe and James, Assignees of Johnston<sup>3</sup> proceeding at law against Houdin—this was the last proceeding by Murray and the last recorded by Kneller.

Murray leaving Quebec in June 1766 was succeeded by Paulus Aemilius Irving for a few months as Lieutenant Governor and then by Guy Carleton in the same capacity. Carleton was consequently Keeper of the Broad Seal of the Province and he sat February 4, 1768, in Chancery to hear the Bill and Cross-Bill of Hay and Barkly. Suckling had received his congé as Attorney General; but he continued to practice law and was still counsel for Hay; he moved for the confirmation of the Masters' report "of the stock taken at Louisbourg on the 1st day of January, 1769"; and Barkly was ordered to file his exceptions forthwith. February 15, on Barkly's motion by Kneller who had become his Counsel, the Masters were ordered to review their report and to report anew—they did so, April 18; and Kneller moved to submit other exceptions which the Masters had seen but had disregarded. The Court confirmed the Report, but gave a day for

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<sup>3</sup>The Englishmen Ord, Rowe and James (Commissary and Paymaster of H. M.'s Artillery at Quebec), as assignees of Johnston brought an action at law against Antoine-Pierre Houdin a French gentleman left at Quebec, after the Cession to take care of the interests of Sieur Cadet, late *munitionnaire*, to sell his property, etc. He presented three statements of card and paper money; one for himself, one for the Sieur Crosnier and a third for the Sieur Cadet. He sued the assignees of William Johnston in the Quebec Court of Appeal—these assignees were John Ord, Jacob Rowe, and William James. Johnston was a captain-lieutenant in the Royal Artillery. Houdin retained the Attorney General, George Suckling, who filed a bill in Chancery to restrain the plaintiffs proceeding with their action at law. It was apparently this suit which was pending in Chancery when Carleton wrote his letter to Shelbourne, April 14, 1766, spoken of *supra*; and the result of this suit in Chancery depended upon the law to be adopted.



"hearing the effect of the Settlement at Philadelphia." April 28, Francis Maseres, the Attorney General, now became Counsel with Kneller for Barkly and on that day Suckling for Hay, Maseres and Kneller for Barkly argued a petition by Hay and the Masters were ordered to file their general report as soon as possible—the cases then stood for nearly a year, except that the Chief Justice, May 26, 1768, made an order—this was not set out in the report and its form and effect cannot now be ascertained.<sup>4</sup>

Carleton became Governor October 28, 1768; he, April 17, 1769, sat as Chancellor when Kneller for Barkly moved that the Masters should revise and re-examine the account of the Louisburg stock; May 20, Suckling for Hay and Maseres for Barkly appeared before Carleton; Maseres presented a petition from his client for the Masters to re-examine as to some 15 articles and it was so ordered. August 10, 1769, Suckling asked for a writ of *Ne exeat provincia*, the motion stood over; November 1, the Masters' various reports were confirmed. November 24, they were ordered to make a general report; April 10, 1770, it was ordered that both Bill and Cross Bill should be heard on "Tuesday the 24th Instant and that the validity or Invalidity of the Philadelphia settlement be argued upon the merits of the whole proceedings." The MS. here comes to an end; and we have no record of the conclusion of this long drawn out suit. The course of the litigation in this Court amply justifies Chief Justice Hey's statement that "the delay and expense incident to a suit commenced therein, have been very burdensome to the parties and are ill adapted to the state and condition of the Province" and but for the provisoes and conditions expressed, one might wonder that the Quebec Merchants should say that "Many to their great concern have felt the want of" a Court of Chancery "since the year 1775."

There are certain pleadings, etc., in certain suits, two in number in this period, which are filed in the Archives.

The suit of *Ainslie v. Welles et al* is a curious instance of Equity jurisprudence. The plaintiff was Thomas Ainslie formerly Collector of Customs for the Province of Quebec, the defendants Arnold Welles of New England, Martin Gay of Boston (Administrator of the estate of Calvin Gay, deceased) and others.

General James Murray when Governor of Quebec, before the Proclamation of 1763 imposed certain duties on rum, wine, and other spirituous liquor landed in the Port of Quebec. Towards the end of

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<sup>4</sup>This Order is mentioned in the Proceedings of April 17, 1769. This "Court orders the Masters to inspect into the Papers, etc., vouched now before them, *vizt.*, Those delivered to them since the order made by His Honour the Chief Justice on the 26 of May, 1768"—there is no record of Proceedings on May 26, 1768. The Chief Justice was William Hey who had been made Chief Justice in 1766 when Chief Justice Gregory received his congé.

1763, Welles shipped from Boston to Stuart Gray & Co., Quebec, for sale and returns sixty casks of rum: Ainslie compelled, by threats of seizure and confiscation, the payment of £43.2.3 (the Spanish Dollar being accounted at 5 shillings), duty. In the spring of 1764, Welles sent to William Grant, Merchant, Quebec, 4133 gallons of rum, sale and returns, and Ainslie in like manner collected £103.6.6. After Murray left the Province, Welles' Agent and Attorney at Quebec in the summer of 1767 hearing that Ainslie was about to leave the Province applied to him to refund the amounts and on Ainslie's refusal brought an action at law against him in Welles' name for £146.8.9 and interest, and obtained judgment for £164.1.0½ (Halifax Currency) and costs.

Calvin Gay of Boston at different times from September, 1763, until August, 1764, sent rum and wine from Boston to Quebec and was forced to pay in all £455.10.0—his administrator through his Agent and Attorney at Quebec brought action "in the Supreme Court of Judicature of the said Province of Quebec" and recovered judgment for £604.9.8 (Halifax Currency) and costs.

Ainslie filed a Bill in Chancery against Welles, Gay and Richard Murray, Deputy Receiver General to His Majesty at Quebec. Against Murray, of course, he claimed indemnity on the ground that he had paid him the customs' dues collected: against the merchants of Boston, he claimed that it was unrighteous to proceed with their judgments to execution on the grounds that they had delayed to bring their actions until the departure from the Province of General Murray who could have given evidence and that he had been unable to plead for want of proper vouchers to draw his pleadings by; charges were made (as a matter of form) of combination and conspiracy.<sup>5</sup>

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<sup>5</sup>Perhaps no better example of the "extraordinary" jurisdiction of the Court of Chancery could be adduced. The rights of the parties have been finally adjudicated so far as that could be done in a Court of Law—the defendant in that Court does not appeal but he sets up a case of alleged hardship.

From the times of James I when Ellesmere and Coke fought the matter out and the doughty Master of the Common Law went down to defeat, there never has been any doubt that the Court of Chancery could and would interfere in cases where by accident, mistake, fraud or otherwise a party obtained an unfair advantage in a Court of Law which as it has been said "must necessarily make that Court an instrument of injustice"—and would restrain the party from using the advantage he has improperly gained.

In the present instance Ainslie set up that he had not been able to plead properly for want of papers and claimed that the Bostonians should not be permitted to issue execution on their judgments. Incidentally he claimed indemnity from the Deputy Receiver General, a proper field of equity.

It is probable that the Bill in Equity was drawn by Francis Maseres who had succeeded Suckling as Attorney General in 1766 (I should have thought the Bill demurrable for multiplicity and perhaps for want of equity).

The "Subpoena to answer" called upon the defendants to answer at a day certain: but for the convenience of defendants at a distance they were allowed (if they resided more than twenty miles from the Registry of the Court) to take out on motion and affidavit a *dedimus*, i.e. a Commission for taking their Answers as was done in the present case.



"His Honour Guy Carleton, Esquire, Lieutenant Governor and Commander in Chief of the . . . Province of Quebec and the Territories thereon depending in America and Keeper of the Broad Seal of the same Province, issued a Commission, July 1, 1768, to "Jonathan Sewall, James Otis, John Rowe and John Hancock, Esquires, and Nicholas Boylston, Gentleman, all of Boston in the Province of Massachusetts Bay in New England" giving them or "any three or two" of them authority to take the Answers under oath of Welles and Gay "plainly wrote upon paper or Parchment"—"Ja. Potts, Regtr" countersigned the Commission.

Rowe, Hancock and Boylston, September 7, 1768, swore Welles to his Answer (prepared by his Solicitor, George Suckling) "at the House of Cord Cordis in Boston"—this was returned to Quebec and filed October 26, 1768. It claims that the duties demanded were imposed illegally and that no written warrant or legal authority was shown by Ainslie for collecting the duties although demanded—the facts of the shipment, exaction of duties, demand for return of same and refusal, action and judgment at law were then set out: the intention to proceed to execution on the judgment "as fast as possible" is avowed and all charges of combination or confederacy are denied.

The same Commissioners on the same day at the same place swore Martin Gay to his Answer prepared by Suckling. It was returned and also filed October 26, 1768—the Answer of Gay is on the same lines as that of Welles.

No other proceedings are of record in this suit.

There is another suit entitled Messrs. Gausselin and others against Monsr. de Lobiniere and wife in which the Bill was filed July 2, 1767 and a "Rule to Answer" taken out—the papers are voluminous and not easy to decipher, this must be the subject of another paper.

After 1770, we have no Register but the Pleadings, etc., in five later suits are extant in the Archives at Ottawa.

November 6, 1770, Henry Kneller, Attorney General, filed an Information "To the Honourable Hector Theophilus Cramahé, Esquire, President of His Majesty's Council for the Province of Quebec, Commander-in-Chief of the said Province and Keeper of the Public Seal thereof." The document covers a whole parchment skin and sets out the Intrusion of René Cartier of Montreal on His Majesty's land, one and a half leagues in depth and four in front bounded by the Seigneuries of St. Louis, Chateauguay, Ville Chauve and La Prairie de la Madeleine on the South Side of the River St. Lawrence. On June 26, 1772, Cartier files an equally portentous answer written in French on parchment, claiming a purchase from Jean Baptiste Le



Ber de Senneville, the original grantee. Many documents are filed in the suit, which was not finished in 1772.<sup>6</sup>

Then follows a Bill for an Account filed before Cramahé, "Keeper of the Great Seal of the said Province," November 26, 1770. It alleged that the Plaintiff, Thomas Venture, and William MacKenzie of Quebec, Merchant, when in London in 1766 bought a Snow, "The Charles," for £1377.10.1 which was to be commanded by Venture and loaded with merchandise—that Venture was to have one-fourth, MacKenzie three-fourths, of which, however, Hamilton and Crawford, two merchants in Dublin were to have one-fourth each. He claims an account: no further proceedings are on file and it is probable that the matter was settled.

Then John Franks of Quebec, through his solicitor, Henry Kneller, December 21, 1772, asks Cramahé "Keeper of the Broad Seal" of the Province for an order restraining the Executors of the late J. Flanagan from proceeding at law upon certain Bonds which the plaintiff claims were obtained by fraud on a sale of land, August 4, 1773. Thomas Dunn and Michael Flanagan, Merchant, surviving executors (the other executor, Jeremiah Daily, being dead) file their Answer through Gerald Fitzgerald, the Answer being a general denial. No further proceedings are on file.

So far all pleadings have been on folio skins; but on May 11, 1772, John Richardson of Montreal, Gentleman, economised by using folio paper when he filed his Bill against Etienne Nizard St. Dizier. Richardson was mortgagee of Antoine Provost and asked for an injunction against the creditors of the mortgagor seizing the land mortgaged. On July 4, 1772, St. Dizier through M. Antill, his Solicitor, filed a general Answer (on parchment).<sup>7</sup>

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<sup>6</sup>The following are of record in the Archives at Ottawa:—

In *re The King vs. René Cartier*.

Information fyled 6 November, 1770 (signed J. Williams as Register).

Exhibit a, Acts de concession par le Marquis de la Jonquière, gouverneur, et Bigot, Intendant, à M. de Senneville, 20 avril, 1750.

Exhibit B. Copie du brocet de ratification de la seigneurie de Senneville actuellement au Sieur René Cartier, ler septembre, 1754.

Exhibit C. Cession par M. de Senneville à René Cartier 26, septembre, 1761.

Exhibit D. Foy et hommage par René Cartier à Son Excellence le General Gage, ler octobre, 1763.

Exhibit E. Extrait du registre des droits de quint.

Exhibit G. Judgment en cour des Plaids Communs dans René Cartier *vs.* Les Sauvages Iroquois, 16 septembre, 1766.

Cartier's Answer to Henry Kneller's information fyled 26 June, 1772.

(Signed J. Williams as Register).

Exception by the Attorney General to Cartier's Answer fyled 14 September, 1772 (signed J. Williams as Register).

Although it was a good English word employed by Blackstone and others the word "Registrar" was not then in general use; "Register" was the official title ordinarily employed.

Bill fyled 11 May, 1772 (signed J. Williams as Register).

<sup>7</sup>Defendant's answer fyled 4 July, 1772.

Exhibit A. Vente par Antoine Noisan à Antoine Prevost, 27 avril, 1762.

In *re Antoine Vialars vs. John Hay*.

March 26, 1774, Antoine Vialars filed a Bill for Foreclosure of a Mortgage against John Hay.<sup>8</sup>

Before passing from this subject it should be mentioned that in a foolscap sized volume, endorsed "Chancery 1769-1784" in the Archives are registered certain proceedings, connected with the Court of Equity.

1769 December 22, Alexander Johnston of Quebec is appointed Examiner in the Court of Chancery; and on the same day, Jenkin Williams is appointed Register.

1770 May 30, Hugh Finlay is appointed Master in Chancery.

There is amongst the papers on file amongst the proceedings in the five cases already mentioned above, a document which has no reference to the Colonial Court of Chancery. It is styled in the cause Frederick Haldimand, Esquire, Plaintiff *v.* Pierre Eu Calvet, Esquire; and is a direction, dated December 1, 1785, to Edward William Gray, Esquire, Sheriff of the District of Montreal, to appear "at the house of Alexander MacPherson in the lower town of Quebec, known by the Sign of the McPherson Hotel" on Saturday, December 17, 1785, to give evidence before the Commissioners F<sup>s</sup>. Levesque, Juchereau Duchesnay, St. George Dupré and Arthur Davidson, who has been appointed by a Commission from the High Court of Chancery in England to take the depositions of witnesses in the Province. The well known Pierre du Calvet had been imprisoned for some time by Governor Frederick Haldimand; on his release he was advised that he could not sue the Governor in the Colonial Courts as Haldimand was the Head of the State. He went to England to complain and endeavour to bring about Haldimand's recall; when Haldimand's term ceased Du Calvet brought an action against him in the Court of King's Bench in England for damages for Assault and False Imprisonment, etc. At that time and until 1830 (1 Will. IV, c. 22, s. 4) the English Common Law Courts had no machinery for taking the depositions of witnesses out of the country and a litigant who desired such evidence must apply to the Court of Chancery for a Commission to take it. Practically all the witnesses were in Canada (of course neither the Plaintiff nor the Defendant could give evidence) and Haldimand applied to the Court of Chancery in England for and obtained such a Commission. Du Calvet came to the Colony to procure his own evidence and was drowned on the return voyage. The action being purely personal, *actio personalis moritur cum persona*, and Haldimand went free.

Coming now to the extant Register already mentioned we find a grant by Sir Guy Carleton, August 26, 1769, of the custody of the

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<sup>8</sup>Bill fyled 26 March, 1774 (signed J. Williams as Register).



estate of Mr. Peter Travers, deceased, to Thomas Dunn, Esquire, and Messieurs John Gray and John Paterson, until the Executors should prove the Will and obtain administration. It was a very old head of Equity thoroughly established as early as the reign of Charles I, that the Court of Chancery should take possession of property to preserve it for the persons entitled.<sup>9</sup>

December 19, 1769, a similar grant is made to Charles Grant of the estate of John Gray of Quebec who had died intestate, Alexander Gray of Edinburgh who was entitled to obtain Letters of Administration being unable to reach the Colony during the winter.<sup>10</sup>

1771 March 1, Carleton made a like grant to John McCord, Simon Fraser and Lachlin Smith of Quebec, Merchants of the Estate of Hector Ross, Merchant of that place, intestate, Anne Ross of Glasgow being next of kin.

June 22, 1771, Cramahé made a similar grant to John Lees, J.P. and Simon Fraser, Merchant, of the estate of John Dalglish of Quebec whose "relations were absent from the Province."

June 28, 1771, Cramahé made a like grant to George Munro and Alexander Martin of Quebec, Merchants, of the estate of Donald Munro of the same place who had been killed accidentally and had died intestate.

Leaving for consideration later the other grant of this character, we shall now discuss proceedings of a quite different character.

So far we have been dealing with a Court of Equity. But it must be borne in mind that Chancery is much wider than Equity.

In English law the word Chancery, Cancellaria, had a very broad connotation; it means in effect all the agencies whereby the Chancellor performs his functions which are wholly non-political; it does not of course include the appointment of Judges, presiding in the House of Lords, and the like.

The Chancellor has been for centuries, certainly since the time of Edward the Confessor, one of the representatives of the King and to him have been entrusted many and different duties.

The Court of Chancery it is usual to say is of two kinds: the Ordinary Court of Chancery and the Extraordinary Court of Chancery. The latter is the Court of Equity of which we have so far been speaking. The Ordinary Court of Chancery was always open; its

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<sup>9</sup>See Story's Equity Jurisprudence, sec. 533.

<sup>10</sup>December 19, 1769, a bond for £1,000 by John Gray with a surety Charles Grant was duly filed. Dunn filed one for £1,000 with a surety John Lees; John Patterson one for £1,000 with a surety Zachary McCaulay of Quebec, merchant a well-known character of the time. An inventory of the estate was filed and later January 7, 1770, there was filed an inventory found by Thomas Johnston in the apartments of Peter Travers. (John Gray was dead by December, 1769, but his bond was binding on his executors).



functions were largely administrative such as the issue of writs, Commissions of Judges of Assize and Nisi Prius, of Oyer and Terminer and General Gaol Delivery, of Justices of the Peace, etc. But it had other functions, the Chancellor might sit as a Court of Common Law to cancel and annul Letters Patent, issued improvidently or by fraud. No instance of this kind has been found in the old Province of Quebec, though there was one case in the Province of Upper Canada almost exactly a hundred years ago. This Court, too, had jurisdiction to declare a person lunatic. Originally the law made no difference between Idiots and Lunatics, and the practice was to issue a writ *de Idiota inquirendo*.<sup>11</sup> When the distinction between Idiocy and Lunacy was recognized distinct Writs were framed for each class, that for alleged lunatics being the Writ *de Lunatico inquirendo*. This was issued by the Chancellor upon the information or petition of one person or persons and was directed to three or more Commissioners, only three of whom were to act. The three Commissioners acting issued a warrant to the sheriff or other officer to summon a jury of 24, and then sat much like the Coroner and heard evidence as to the lunacy with a jury of 20 or more selected from the panel returned. A verdict by 12 jurors was accepted.

On the return by the Commissioners of the jury's finding or inquisition, unless the inquisition was quashed by the Court of King's Bench and a *venire facias juratores* there granted, the condition of the party was established. Down to the declaration of lunacy, all the proceedings were at the Common Law and appeals, etc., were taken to the Court of King's Bench or by writ of Error to the House of Lords.

But by one of the anomalies of the law of England, once the lunacy was established the Chancellor no longer acted as at the Common Law, nor was he bound by the rules of the Common Law.<sup>12</sup>

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<sup>11</sup>For the form see Fitzherbert, *Natura Brevium*, Ed. 1730, pp. 530 sqq. this issue was tried by twelve men do., do. 232; Tomlins' Law Dictionary, sub. voc. Idiots and females *i.e.*, while the jury was composed of more than twelve, the verdict of twelve was accepted just as the finding of a Grand Jury.

<sup>12</sup>Blackstone, *Comm. Bk. III*, p. 427, says with perfect accuracy "as to idiots and lunatics . . . a warrant is issued by the King under his sign manual to the Chancellor or Keeper of his seal to perform this office (of committing the custody of them to proper committees) for him, and if he acts improperly in granting such custodies the complaint must be to the King himself in Council. But the previous proceedings on the commission to enquire whether or no the party be an idiot or a lunatic are on the law side of the Court of Chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law. See *Sheldon v. Fortescue* (1731) 3 Peere Williams, 104, note A, which quotes from the Journal of the House of Lords, a decision of the House, February 14, 1726, refusing to hear a petition and appeal of William and Samuel Pitt complaining of two orders made by the Lord Chancellor, Lord King, granting the custody of the person of their uncle, Samuel Pitt. The appeal was then brought before the King in Council and decided, May 15, 1728. See also *Oxenden vs. Lord Compton* (1793) 2 Ves. Jr., at p. 72.

It is not quite certain how the Chancellor became seized of the estate and person of one declared lunatic. No doubt he represented the King as *parens patriae*, and apparently on the abolition of the Court of Wards and Liveries<sup>13</sup> at the Restoration he was charged along with his other duties in that capacity, also with this duty. The Chancellor, after the finding of lunacy, was in a very curious position; he was a judge but did not sit as a Common Law judge or as a Court of Equity proper as is proved by the fact that appeals from his orders and judgments were taken to the King-in-Council and not to the House of Lords.<sup>14</sup> This very curious and interesting jurisdiction was once exercised at Quebec. In 1772, seven gentlemen of Quebec petitioned Cramahé in respect of John Baird, a Merchant of Quebec, setting out that he was insane and should not be allowed to be at large; and Judge Adam Mabane (who was a medical man) and James Gill gave a certificate, November 3, 1772, that they had visited Baird and that he should be confined and watched. February 8, 1772, Cramahé issued a Writ *de Lunatico inquirendo* to Thomas Dunn, Peter Stuart and Malcolm Fraser, J.P.'s and Charles Grant and John Aitkin, Gentlemen. Dunn, Stuart and Fraser issued a precept to the Deputy-Provost-Marshal, Jacob Rowe, to summon 24 honest and lawful men to meet at the House of John Lee, Leather Dresser, in St. John's Suburb Quebec "commonly called or known by the Name and Sign of the Buck." Jacob Rowe returned a panel of 40. The jurors met at "the Buck," 24 were selected from the panel and these sat first at "the Buck" and then by adjournment at "the House of Sybil Graham, widow, situate in the Upper Town of Quebec." The jury returned an Inquisition, February 17, 1773 that Baird was "lunatick and of unsound mind," but with lucid intervals<sup>15</sup> and that he had no lands but had personal estate.

Adam Lymburner, Merchant, and George Davidson were appointed Committee of the Estate; no Committee of the Person seems to have been appointed.

The Committee of the Estate reported the estate insufficient to

<sup>13</sup>After the unsuccessful attempt by James I to get rid by arrangement of this Court which had been intended for the relief of the subject but had outgrown its usefulness and become obnoxious to the Kingdom at large, (See 4 Coke Inst. 202) it was suppressed in 1646 and abolished in 1660 by the Act. Car II, c. 24.

<sup>14</sup>See Story's Equity Jurisprudence, secs. 226, 1335 sqq; 2 Fonblanque Equity Bk. 2, Pt. 2, c. 2, sec. 1 sqq; 2 Maddock Prac. Chan., c. 4, p. 565.

<sup>15</sup>The inquisition must be under seal by 36 Edw. III, c. 13, Dyer, 170 a, and must be under the seals of at least 12, or the officer by whom it was taken was liable to a penalty of £100. 1 Hen. VIII, c. 8—the Commissioners here made sure by having the signatures and seals of 24 jurymen.



pay the debts and were directed to advertise for creditors in the Quebec Gazette.<sup>16</sup>

Perhaps a still more interesting exercise by the Governor of a Common Law right of the Chancellor took place in 1771. William Hey the Chief Justice wanted to enclose a "certain Cross Road, leading from the High Road which goes from Quebec to old Lorette and running close by the said William Hey's Garden Court and Mansion House down to a ford in the River St. Charles"; he was willing to give another road which he claimed to be equally convenient in lieu of the road to be closed.

At the Common Law the only way to close a common highway was to procure the King's license and that could not be done without an enquiry and report under a Writ *ad quod damnum*.<sup>17</sup> Hey asked for a royal license and Cramahé as Chancellor, April 3, 1771, issued to the Provost-Marshall of the Province of Quebec, a writ directing him to "enquire by the oath of Honest and Lawful men whether it will be to the Damage or Prejudice" of the King or others, to grant the license asked for. The Provost-Marshall empanelled a jury, six English and six French speaking; and the jury found that the licence could not prejudice any one; the Inquisition signed and sealed by Provost-Marshall and jurors was made, April 29, and filed, May 21, 1771.

There remains an instance of a Governor at least in form acting as Chancellor after the Quebec Act of 1774, but that was but taking a care of property which it was believed had escheated to the King. Such jurisdiction might well be exercised by the Governor as Governor without appealing to his powers as Chancellor; and perhaps that was the intention.<sup>18</sup>

Seigfried Langerjaan "formerly a Lieutenant in the service of the Duke of Brunswick" died in Quebec, February 26, 1786 "in consequence of a wound given to himself as it is said by the firing of a pistol at his own person." Upon this coming to the attention of the authorities, proceedings were at once taken. A *felo de se*, "he that

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<sup>16</sup>The Committee of the Estate had found debts as follows:—

Debts in London £2694.12.4 sterling

Kilmarnock 58.16.7 "

" 10.4.9 "

Glasgow 13.18.2¼ "

To Captain Brock 54.11.8 Halifax currency.

There were also debts to sundry people in the Province "we suppose about £50 Halifax currency." While they had collected only £1464.9.8 Hal. Cy, a pretty bad showing—the Halifax currency was then considered worth 9–10 of the sterling money. This would give a dividend of about 46% less the expenses which would probably reduce it to about 25%.

<sup>17</sup>For the form of this Writ see Fitzherbert, *Natura Brevium*, 512, seq.

<sup>18</sup>This is made the more probable as the proceedings are noted by "J. A. Shepherd Acting secy" and not by anyone purporting to act as Register or as Clerk of the Crown in Chancery.



deliberately puts an end to his own existence," cannot, indeed, be punished in person; but by the English Common Law his reputation and fortune were affected. His dead body was ignominiously buried in a highway with a stake driven through it and his goods and chattels were forfeited to the King. Such forfeitures were a regular part of the King's Ordinary Revenue or *Census Regalis*.<sup>19</sup>

Sir Frederick Haldimand, the Governor, March 18, 1784, granted the custody of the estate of Langerjaan for the King to "John Renaud of the Parish of Lorette, Esquire, and Godfrey King of Quebec, Furrier," John Renaud had filed a Bond for £500 with John Justus Diehl, Merchant, of Quebec as surety, March 8, and Godfrey King had filed a Bond for the same amount, March 11, 1784 with John Sauls, Baker, of Quebec, as surety. These bonds are signed by the obligors and by Jenkin Williams and Brassard "temoin."

This terminated everything that looks like Chancery in the old Province of Quebec.

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<sup>19</sup>His lands escaped forfeiture: therefore he could validly dispose of his lands by will, but not of his goods and chattels. Blackstone Comm. Bk. I, pp. 299-300 Bk. II, p. 499, Bk. IV. pp. 189, 190.

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# ILLINOIS LAW REVIEW

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NOVEMBER, 1915

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## THE LAWYER IN INTERNATIONAL ARBITRATION.

BY WILLIAM RENWICK RIDDELL.<sup>1</sup>

"The extraordinary spectacle of an international boundary of nearly four thousand miles existing for a century without a fortification and without even a garrison post has rightly attracted the attention of the civilized world. In length, in period of existence and in the pacific relations of those on either side, this boundary line is unique, the miracle of the nations and of the ages. The length rests upon geographical reasons, its period of existence and these relations upon the characteristics of the peoples, their ideal of life and of international conduct. \* \* \*

"There are only two principles of international conduct worth considering: The first, 'Might makes Right; Might is Right. I can, therefore I ought and will.' The other, 'Right is Right, and because Right is Right, to follow Right were wisdom in the scorn of consequence.' \* \* \*

"It seems to me that the course of dealing between the United States and Britain—amongst English-speaking peoples—shows that the rules by which they have governed themselves in their international relationships are those prescribed by the laws of justice and right. I do not at all mean that in every case this was so. \* \* \*

"But *exceptis excipiendis* and speaking generally, I have no hesitation in saying that both nations have, in their dealings with each other, sought the right; the right whether declared by the law of God or the international law of human convention or determined by previous agreement. A scrap of paper where a name was set we have held 'as strong as duty's pledge and honor's debt.'

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1. Justice of the Supreme Court of Ontario.

"Unless I am wholly mistaken, it is precisely this conception of international conduct which has preserved for us the peace for a hundred years."

The above language taken from an address, made a short time ago before an American audience, correctly sets out my view arrived at after careful study of the international dealings between the English speaking peoples. It is the object of this paper to say something about the lawyers who took part in determining matters in dispute.

A very great deal of controversy took place over the interpretation of treaty; and it is to be noted that at no time did either nation decline to be bound by its contracts or raise captious objections to their validity—invariably it was an honest difference of opinion as to meaning. Lawyers are no small part of their time engaged in the interpretation of written documents, constitutions, statutes, contracts, decisions; and who so competent as they to determine the meaning of a written document?

In the Treaty of 1783, one boundary was called the River St. Croix—any one of several rivers might be the St. Croix, and by Jay's Treaty of 1794 the determination as to which was meant was left to three commissioners, one to be chosen by each government, these two to choose the third. The United States selected David Howell, a graduate of Princeton, who had been Professor of Mathematics and Natural Philosophy and also of Law in Brown, and subsequently Attorney General of Rhode Island and a judge in its Supreme Court; Britain selected Thomas Barclay, who had been a student of Jay's, but remaining loyal to the Crown, emigrated to Nova Scotia, where he practiced law. Howell suggested as the third, Egbert Benson, and as Barclay believed him to be "cool, sensible and dispassionate," he agreed to accept him. Benson was a graduate of King's College (Columbia), the first Attorney General of the state of New York and at one time a member of its Supreme Court. He was subsequently to be a judge of the Circuit Court of the United States. These three commissioners gave effect to the British Contention (1798).

The same treaty of 1783 had fixed the boundary "along the Highlands"—by the Treaty of Ghent, 1814, the determination of the line of the Highlands was left to two commissioners—the United States chose Cornelius P. Van Ness of Vermont, a prominent lawyer, afterwards Chief Justice and Governor of that state; Britain, Thomas Barclay, already mentioned. They failed to agree and after an abortive reference to King William of the Netherlands

(1827-1831) Lord Ashburton and Daniel Webster arranged the dispute in 1842.

A third boundary along the international lakes and rivers was by the Treaty of Ghent left to two commissioners—Peter Buel Porter, a graduate of Yale and of the Litchfield Law School, who had practiced law at Canandaigua, N. Y., was the American—and they made their award at Utica in 1822.

From the Lake of the Woods, west to the Rockies, the line was fixed by diplomacy in 1818, from the Rockies to the sea by the same means in 1846, and the line of the "main channel" along which the international boundary was to run, by Emperor William of Germany in 1872 under a reference agreed to in the Treaty of Washington, 1871.

By the Treaty of Ghent, 1814, it was left to two commissioners to determine the boundary at Passamaquoddy Bay. Thomas Barclay was again chosen by Britain, the United States appointed John Holmes, a resident of that part of Massachusetts which was to become Maine, a lawyer of standing, who was to be Senator from Maine when Maine became a separate state. The two commissioners agreed, each giving up part of his own opinion and giving the Grand Manan and other islands to Nova Scotia, Frederick, Dudley and Moose to Massachusetts. I have heard it stated that no complaint was ever made concerning the award till very recently, when many members of one political party in the United States expressed the wish that Moose Island had been given to Canada. *Se non è vero, è ben trovato*.

There remained but the Alaska boundary—that was determined (1903) by "six impartial jurists of repute: Lord Alverstone, Lord Chief Justice of England; Sir Louis Jetté, who had been Chief Justice of Quebec, and John Douglas Armour, who was a Judge of the Supreme Court of Canada, and had been Chief Justice of Ontario, were nominated on the one side; Senators Root of New York, Lodge of Massachusetts, and Turner of Washington on the other. (Mr. Justice Armour died and was succeeded by A. B. [is now Sir Allan] Aylesworth, K. C., then and now a practicing barrister in Toronto, and afterward Minister of Justice of the Dominion.)

So much for boundary lines proper.

Upon the acquisition by the United States of Alaska, it adopted the claims of Russia which formerly had been met by its vigorous protest—the whole question of Bering's Sea being a *mare clausum*, the jurisdiction over and property in seals, etc., was left to a board composed of Lord Hannen, Lord of Appeal in Ordinary, and Sir



John Thompson, Attorney General and Minister of Justice of the Dominion (appointed by Britain); Mr. Justice Harlan, of the Supreme Court of the United States, and Senator John T. Morgan, a lawyer of eminence, who was afterwards selected to frame a Code for the Hawaiian Islands (appointed by the United States); Baron Alphonse de Courcel, Marquis Emilio Visconti Venosta and Mr. Gregers Gram, appointed by the President of France and the Kings of Italy and of Sweden and Norway, respectively—their award was made in 1893 at Paris.

On the Atlantic there had been trouble about cod-fishing, etc. The Treaty of 1783 set out the rights of the Americans; it was argued that the war of 1812 had put an end to this treaty in this regard; the Treaty of Ghent was silent on the subject (John Quincy Adams and Henry Clay could not agree—the whole story makes delectable reading); in 1818 a Convention was made setting out what rights Americans should have and what they “renounced”; in the Elgin-Marcy Reciprocity Treaty of 1854 it was provided that so long as the treaty should be in force, Americans should have the same fishing rights as before the war. In 1866 the United States denounced that treaty, striking at Canada by way of vicarious punishment of Britain for her conduct during the Civil War—a real neutral never is loved by any belligerent. The fishing rights were automatically reduced to those prescribed by the Convention of 1818, but who ever heard of a fisherman abandoning an ancient fishing pool, or being able to distinguish between his neighbor’s full pond and his own depleted one? The American fishermen trespassed sporadically, perhaps a little more than sporadically, and there was a good deal of friction. At length in 1871 by the Treaty of Washington, the amount to be paid by the United States for privileges exercised without right by American fishermen was left to a Board of Arbitration who in 1877 made an award of \$5,500,000 against the United States. This was paid after much grumbling and talk of repudiation. The two inalienable rights of a freeman in case of an adverse decision are (1) appeal and (2) damn the judge. Appeal was not open to the United States, and Congress and Press took it out in damning the Board.

But there were still outstanding matters of dispute and an agreement was entered into in 1908 to refer the whole matter to a judicial body chosen from the general list of members of the Permanent Court at the Hague. The judges selected were George Gray of the Circuit Court of Appeals, Sir Charles Fitzpatrick, Chief Justice of Canada; Dr. H. Lammasch of the University of Vienna and

Aulic Councillor, Jonkheer A. F. De Savornin Lohman of the Netherlands, and Dr. Luis Maria Drago of Argentina. They met at the Hague in 1910 and made an award which both parties to the dispute claimed as a triumph. *O si sic omnia*.

A claim was made by the United States against Britain for illegal seizures, etc., during the Napoleonic wars; this was by Jay's Treaty, 1794, referred to a Board of five commissioners. They were Drs. John Nichol and John Anstey, of the Bar of Doctors' Commons; Christopher Gore, the preceptor of Daniel Webster, and United States' Attorney for Massachusetts; William Pinkney, who afterwards became Attorney General of Maryland and was by Madison appointed Attorney General of the United States, and Col. John Trumbull, the "Admirable Crichton" of the day, who could paint as well as he could fight—he came from Connecticut. Dr. Nichol retiring to become King's Advocate, he was succeeded by Dr. Maurice Swabey, also of Doctors' Commons. Their deliberations were interrupted by an unfortunate snarl which took place in another arbitration going on concurrently, but in February, 1804, they made a satisfactory award.

When the Emperor of Russia decided (1822) that under the Treaty of Ghent, Britain must pay for quondam slaves, who had gone with her armies, it was left to four gentlemen to determine (1) the average value, and (2) the number. These were George (afterwards Sir George) Jackson, rather a diplomat than a lawyer, and John McTavish, unknown to fame; Langdon Cheves, Judge of the Supreme Court of South Carolina, and Henry Seawell, Judge of the Superior Court of North Carolina. They decided the former question readily in 1824, but failed in the latter. Diplomacy fixed the amount to be paid by Britain at \$1,204,960 which she paid rather than return the negroes to the land of the free and the home of the brave.

Other claims of the citizens of the one country against the subjects of the other and vice versa, were decided (under an agreement made in 1853) by Sir Edmund Hornby, Judge of the Consular Court at Constantinople; Nathaniel G. Upham, Judge of the Supreme Court of New Hampshire, and Joshua Bates, a Boston man, graduate of Harvard, but a partner in London of the Banking House of Baring Bros. & Co. The two first named had hoped to get Martin Van Buren to act as third, but "Little Van" declined.

By the Treaty of Washington, 1871, certain claims against Britain and the United States, respectively, were left to be disposed of by Russell Gurney, Recorder of London and Judge of the Sheriff's



Court; James Somerville Frazer, former Judge of the Supreme Court of Indiana, and Count Louis Corti, Italian Minister at Washington.

A convention signed in 1896 agreed that the amount to be paid Canadian sealers for the wrongful seizure and interference by American vessels should be decided by two commissioners, who might, if necessary, appoint an umpire; William L. Putnam, Judge of the United States Court of Appeals, and George Edwin King, Judge of the Supreme Court of Canada, did not find it necessary to appoint an umpire, but agreed upon the amount.

Perhaps here might be mentioned a reference to commissioners in a case in which the United States was not nominally but was in fact a part—the international boundary of Venezuela and British Guiana. The Board was composed of Lord Herschell, formerly Lord Chancellor; Sir Richard Henn Collins, then Justice of the Supreme Court of Judicature and to be Master of the Rolls; Chief Justice Fuller and Mr. Justice Brewer of the Supreme Court of the United States and M. de Martens of St. Petersburg, a distinguished Russian jurist. Their award, made in 1899, was satisfactory—at least to Britain.

It seems to me that these examples show that both nations placed confidence in their judges and lawyers—I do not draw the fine distinction sometimes drawn between these classes, and perhaps I should have said “judges and other lawyers.”

Other arbitrators of whom in some instances I have not been able to get much if any information are as follows: Under Jay's Treaty of 1794 to determine the amount to be paid by the United States to British creditors who were prevented by state laws from collecting from these debtors—Henry Macdonald (whose arbitrary conduct is said to have had much to do with the failure of this arbitration, if any one can conceive of a man with such a name being stiff in his opinions) Henry Pye Smith, Thomas Fitzsimons, James Innes, Samuel Sitgreaves and John Guillemard. To lay out the boundaries of American fishing rights under the Convention of 1818, M. H. Perley, G. G. Cushman, Benjamin Wiggin, John Hubbard, E. L. Hamlin—of these I know nothing—John Hamilton Gray, a lawyer, and Joseph Howe, a journalist. To determine the amount payable to British subjects for property taken by the United States, south of the 49th parallel, Alexander S. Johnson of New York and Sir John Rose of Montreal (a banker and financier); Benjamin R. Curtis, formerly of the Supreme Court of the United States and counsel for President Johnson on his impeachment, was selected as



umpire but not called upon—this was in 1869. In the Halifax Fishery award of 1877 Sir Alexander T. Galt (who was not but, as his brother Sir Thomas Galt, Chief Justice of our Court of Common Pleas once told me, should have been, a lawyer), John H. Clifford and Ensign Kellogg. King William of the Netherlands failed to fix a satisfactory "North-Eastern Boundary," but Emperor William I. of Germany succeeded in 1872 at the far west at San Juan, while the Emperor of Russia passed upon the question of liability to pay for slaves.

Lawyers have no occasion to be ashamed but on the contrary they should feel proud of the record of their profession in our Century of Peace.

## A BRIEF REVIEW OF CRIMINAL CASES IN THE SUPREME COURT OF ILLINOIS FOR THE PAST YEAR.<sup>1</sup>

BY EDWIN R. KEEDY.<sup>2</sup>

This is the third time that a review of a year's decisions in criminal cases by the Illinois Supreme Court has been presented to this body. In each instance the cases from March 1 of one year to the same date of the following year have been considered. During the first year the court decided thirty criminal cases, of which twenty were affirmed, and ten reversed. In the next year thirty-six cases were decided, eighteen being affirmed and the same number reversed.

During the past year opinions were handed down in thirty-five cases. Of these twenty-one were reversed and fourteen affirmed. All but four of the cases in which the judgment was reversed were remanded for a new trial. This brief summary of the past three years shows that the number of cases before the court has tended to remain constant while the percentage of reversals has increased, sixty per cent of the cases having been reversed during the past year. According to the statistical review of the work of the Supreme Court for ten years from June 11, 1900, the percentage of reversals for those years was forty-two per cent, the high water mark being reached in the year 1906-1907, when the reversals represented sixty-one per cent of the cases decided. In the opinion of the writer these figures furnish no basis for concluding that the Supreme Court has become unduly inclined to set aside convictions, but they do show the miscarriage of justice in a large number of cases.

In presenting the decisions of the Supreme Court to you, the cases in which the judgment was reversed, being considered more significant both from a legal and social point of view, will be first discussed. Six convictions were reversed because in the opinion of the court the evidence was not sufficient to support the verdict. Three of these convictions were for murder<sup>3</sup>; one for burglary<sup>4</sup>;

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1. A paper read at the meeting of the Illinois branch of the American Institute of Criminal Law and Criminology in June, 1915.

2. Professor of Law in the University of Pennsylvania.

3. *People v. Rischo*, 262 Ill. 596; *People v. York*, 262 Ill. 620; *People v. Bartley*, 263 Ill. 69.

4. *People v. Blair*, 266 Ill. 70.

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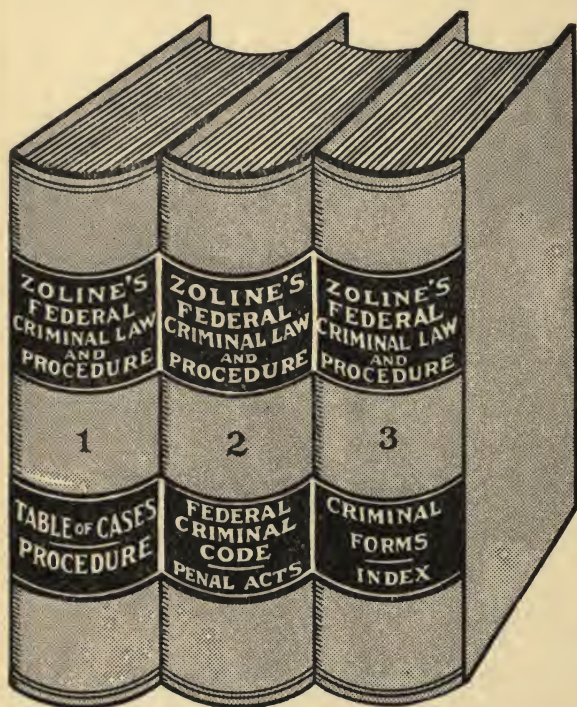
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OF THE NEW YORK BAR

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Procedure"

**T**HIS treatise, containing an *introduction by the Hon. Henry Wade Rogers*, Judge of the United States Circuit Court of Appeals, for the Second Circuit, formerly President of Northwestern University and Dean of the Schools of Law of Yale and Michigan Universities, and written by an author whose reputation as a federal practitioner is second to none, will, we believe, be eagerly received by the legal profession.

*The extension of federal power in recent years to matters heretofore wholly within the control of the States, and the passage of so many new acts virtually embracing all forms of human endeavor and industry in addition to the many thousands of federal offences heretofore existing, carrying with them, as they do, heavy fines and penalties, furnish at this time great reason for a book on Federal Criminal Procedure, wherein the liabilities, rights, privileges and immunities of a person accused of crime in the courts of the United States, and the relative jurisdictions of the Federal and State courts in criminal cases are clearly defined and set forth.*

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## DIVERSITIES DE LA LEY

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LEGAL ETHICS CLINIC OF THE NEW YORK COUNTY LAWYERS’ ASSOCIATION.—198. *Question:* In the exercise of the rights of subrogation reserved in an insurance policy, the insurer, having partially paid a loss (to the extent of its liability), takes an assignment from the insured of an interest to the extent of the amount paid in his right of action against a negligent third person for having caused the entire damage, for which the insured has been only partially compensated by the insurer.

Assuming that only one action can be brought for the entire damage, is it the opinion of the Committee

(a) That the attorneys for the insurance Company can properly request the assignor to join in the action as plaintiff so that the entire right of action may be prosecuted in the names of both of the real parties in interest?

(b) That the attorneys may, with professional propriety, stipulate with the assignor either upon their own initiative or at the request of the assignor for a contingent or other fee for their services to him payable out of his share of the recovery (they being also compensated by the insurance company for the legal services to it)?

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# ILLINOIS LAW REVIEW



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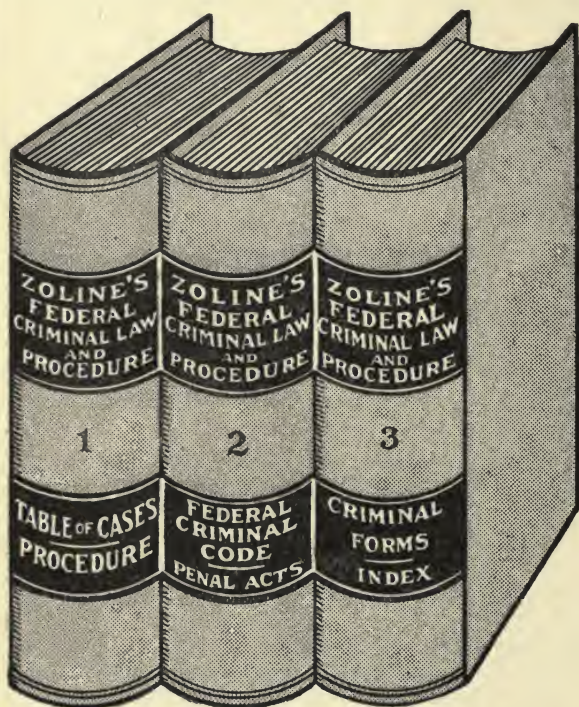
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By

Elijah N. Zoline

OF THE NEW YORK BAR

Author of

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THE STATUTES-AT LARGE.—The lawyer who remembers and appreciates the fact that he is not a Cheirotechnes, a Banausos, a tradesman, or a mechanic, but a member of a liberal and a learned profession, will desire to know law as law and not merely as a means of livelihood, a bread-and-butter business. Such a one can never be indifferent to the origin of his science—he will avoid what Cicero deprecated, “rivulos consecrari, fontes rerum non videre.” To lawyers of that kind I recommend as a delightful, interesting and useful divertissement, the study of the Statutes-at-Large. It is not intended here to discuss how written laws were framed, passed or promulgated in early times, or to say anything of certain statutes which are not to be found upon record though supposed to be known to the judges.

In 1764, Owen Ruffhead (1723-1769), a barrister of the Middle Temple, completed his collection of the statutes from Magna Charta to that date and published them. The edition being exhausted, Charles Runnington, serjeant-at-law (who had been of the Middle Temple), prepared a new edition of the Statutes-at-Large from Magna Charta to 25 George III (1785) which was published in ten volumes in 1786. It is to this edition that reference will be made.

First appears Magna Charta—not purporting to have been granted by King John at Runnimeade, June 19, 1215, but as granted by Henry III, son of King John, in the ninth year of his reign, i. e. 1225, and confirmed by Edward I in the twenty-fifth year of his reign, i. e. 1297.<sup>1</sup>

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1. I use the spelling ‘Carta’ except where authors quoted or referred to, use the spelling “Charta.”

The story of the circumstances leading up to Magna Carta is well told by McKechnie in his “Magna Carta, a Commentary on the Great Charter of King John,” Glasgow, 1905. Thomson’s “Historical Essay on the Magna Charta of King John,” London, 1829, is well known and is worth reading. (I have rather a personal quarrel with Thomson—on p. 291 he truly says “Eustace de Vesci (one of the Barons of Runnimeade) . . . married a beautiful woman, Margaret, daughter of William (the Lion), King of Scotland,” and he tells the unsavory tale of King John’s advances to her. Thomson also says truly that the male line of the family terminated in William, who was killed at Bannockburn, 1314. But he is in error in saying that the female line ended in Margery, niece of de Vesci. The fact is that a daughter of de Vesci married a Riddell of that ilk, i. e., Riddell of Riddell (in Roxburghshire) and her descendants are found all over the civilized and most of the uncivilized world. “Quorum pars minima sum.” Filial regard for the ancient ancestor, however, does not prevent my recognizing that Shakespeare’s “meek and gentle Duncan” was a ferocious old ruffian, and got no more than he deserved.

Blackstone’s sumptuous volumes on Magna Charta are a delight to the eye as to the mind. I cannot say that I have added much or anything of value to the knowledge of the Great Charter in my address on Magna Carta before the Law Academy of Philadelphia, 1917.

Coke in his Second Institute gives the Henry III Charter and notes the many “Statutes of Confirmation,” from 52 Henry III (1267) to 4 Henry V (1416).



Magna Carta had its origin in the successful determination of the oligarchy of England not to allow one man to monopolize all the power—a phenomenon appearing during recent years in the United States<sup>2</sup> as often in the history of the English-speaking peoples. "Whatever Magna Charta may be in law, whether a treaty between king and subjects, charter or grant by the king, declaration of rights, constitution, statute, what not, it is also a long and miscellaneous code of laws" (Pollock and Maitland, Vol. I, p. 658) "the first great public act of the nation after it had realized its identity" (Stubbs, "Const. Hist.," Vol. I, p. 571).<sup>3</sup>

In part from the real value of its express provisions, in part from a misunderstanding of its meaning but mainly from the spirit rather than the letter, this Great Charter for centuries has been and still is held in veneration not only in England, but wherever the English law is followed or the English language spoken.

Oliver Cromwell once in a moment of deep irritation spoke most contemptuously of Magna Carta. His vulgar jingle was rather broad even for his plain-speaking times and is quite unquotable at the present time even in a legal journal.<sup>4</sup> Cromwell's ribald wit was copied by Lord Chief Justice Kelying against whom it was charged in the House of Commons in 1667 that he "hath undervalued, vilified and contemned Magna Carta, the great preserver of our lives, freedom and property"; and he escaped punishment only by an abject submission, "great humility and reverence."<sup>5</sup> A great deal of Magna Carta is in affirmance of the Common Law—how much, perhaps, cannot be said with certainty. For practical purposes, that is law which the courts have so decided: and the Year Books had not begun. In the main we must rely upon Coke, and what Coke says has been considered the fact until the contrary has been conclusively proved.

Very much of Magna Carta is effete or not applicable in the present day even in England, e. g., Caps. 2, 31, relief; Caps. 3, 4, 5, 6, wardships; Cap. 12, assizes of novel disseisin, etc.; Cap. 13, darrein presentment; Caps. 15, 16, bridges and banks; Cap. 17,

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2. Of course, being a Canadian, American, indeed, but not *an* American, I express no opinion as to the wisdom of the people of the United States in their recent uprising against one man rule—and anyway everyone has the right to lick his own nigger. I do not compare Woodrow Wilson to King John or Henry Cabot Lodge to Eustace de Vesci.

3. The quotation is from a judgment of my own, *Smith v. City of London* (1909), 20 Ont. L. R. 133 (at p. 140). The late Professor Goldwin Smith with more zeal than knowledge had somewhat bitterly criticized my judgment in *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 Ont. L. R. 275, as being against Magna Carta, although he explained his criticism by the fact that he knew more constitutional history than law (and, indeed, he could not well know less). Counsel adopted the professor's argument in the subsequent case, *Smith v. City of London*, and it was necessary for me to discuss what Magna Carta really is.

4. The curious who can stand it, may find the language quoted in Campbell's "Lives of the Chief Justices, Vol. 1, pp. 432, 433. Cromwell had a somewhat peremptory way with mere judges.

5. See Campbell's "Lives of the Chief Justices," Vol. I, pp. 509, 510; How. St. Trials, VI, p. 995.

pleas of the crown; Cap. 19, purveyance; Cap. 20, distress in certain cases; Cap. 21, averagium, etc.; Cap. 22, forfeiture of lands for felony; Cap. 23, kiddles on the Thames, etc.; Caps. 24, præcipe in capite; Cap. 26, writ of inquisition; Cap. 27, socage and burgage tenures; Cap. 28, wager of law; Cap. 30, safe conduct for merchants, etc.; Cap. 32, sale of land by freemen; Cap. 33, patrons of abbeys; Cap. 34, appeal of death by woman; Cap. 35, county courts; Cap. 36, religious houses; Cap. 37, escuage, elsewhere than in England and later Ireland. Caps. 1, 38 referring to the Church were of no consequence except in England nor was Cap. 9 of the Liberties of London important.

By Cap. 7, the dower and quarantine of a widow were secured and she was relieved from the necessity of marrying except where she pleased.<sup>6</sup>

Cap. 8, providing for the exemption of land from seizure for debt so long as the debtor has sufficient goods for the purpose shows the reverence in England and English law for land. To this day a sheriff must if possible make the amount of his writ of fieri facias out of the goods of the debtor. The liability of land to pay judgments derives ultimately from the Statute of Westminster II (1285), 13 Edward I, c. 18.<sup>7</sup> "When a debt is recovered or acknowledged in the king's court or damages awarded it shall be . . . in the election of him that sueth for such debt or damages to have a writ of fieri facias . . . to levy the debt of the lands and goods . . ." The writ of fieri facias is said to be a common law writ,<sup>8</sup> but it covered only goods and chattels, the words being "*quod fieri facias de bonis et catallis*." The Statute of Westminster II gave the right to the writ of *elegit* which directed the sheriff to deliver the goods and chattels of the judgment debtor (with certain exceptions) and one-half his lands to his creditors until debt paid.<sup>9</sup> There was, however, no provision for the sale of the land so taken in *elegit*: and the defect is still in the English law. Land was never so sacred in the colonies as in England: and Parliament recognized the fact. In 1732 an act was passed allowing "the Houses, Lands, Negroes, and other Hereditaments and Real Estates" of debtors in "the British Plantations in America" to be sold in the same way as "Personal Estates."<sup>10</sup> In my Province, Upper Canada (now Ontario), it was for some time a question whether the Act of 1732 was effective to render lands in the province liable to a writ of

6. "A widow after the death of her husband incontinent . . ." is the translation. "Incontinent is not an adjective but an adverb; it does not mean "unchaste" but "forthwith"—a sense in which it is still occasionally employed in burlesque or mock archaic styles as for example by Barham in the *Ingoldsby Legends* (1840).

7. See Vol. I, p. 93, *Statutes at Large*.

8. See Co. Litt. 290b, FF 3 of Vol. II of Charles Butler's edition (1823).

9. All the debtor's lands instead of one-half under (1838) 1, 2, Vict., c. 110, s. 2.

10. (1732) 5 George II, c. 7, s. 4. It is to be observed that negroes were real estate just as Villeins were at the Common Law. In Canada, however, perhaps from the influence of the French law, negro slaves were treated as personal estate. I have copies of several bills of sale of negro slaves:



feri facias: the first case actually reported in the province resulting in a division of opinion an appeal was taken to the King in Council and the liability was affirmed.<sup>11</sup> But in every case lands cannot be sold until the goods are exhausted.

Cap. 10 deals with distress, a very common subject of legislation in olden times. "No man shall be distrained to do more service for a knight's fee nor any other freehold than therefor is due." This is said to be declaratory of the Common Law; and it is also clear that the writ of "ne injuste vexes" is of the Common Law and was not founded in Magna Charta. What we in modern times call distress, i. e., the taking without legal process by the landlord of the goods of his defaulting tenant, seems to come from the old feudal law. Until 1690 goods taken by distress were merely a pledge and could not be sold, but in 1689 a statute<sup>12</sup> was passed with the preamble: "Whereas the most ordinary and most ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby": and the statute authorized a sale after five days, the rent still unpaid. The same statute provided double damages for the tenant whose goods were seized for rent where no rent was due. But long before, the Statute of Marlebridge had, in 1267, provided that "distresses should be reasonable and not too great, and he

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11. *Gray v. Willcocks*, reported in "The Oracle," at York (Toronto), January 18, 1806. The King's Bench Term Books show that John Gray obtained a judgment against William Willcocks; that in Michaelmas Term, 46 Geo. III, November 6, 1805, Mr. Scott (afterwards attorney general and chief justice) obtained from the court (Powell and Thorpe, JJ.) a rule calling upon the defendant to show cause why a fi. fa. (lands) should not issue on the judgment in debt, the fi. fa. (goods) being returned nulla bona and it was directed that the rule should be personally served on the defendant. After an enlargement, the matter was argued November 15, 1805, and on January 18, 1806, the court divided, Powell, J., being in favor of the issue of the fi. fa. (lands), but Thorpe, J., holding that such a writ could not validly be awarded. As the Term Book sententiously puts it, "Upon solemn argument the court divided, Mr. Justice Thorpe against the motion, Mr. Justice Powell for motion." Allcock, C. J., was absent. This was the third time the point has been argued. The first time Allcock, J., had held that the writ should not and Powell, J., that it should issue; the second time, Allcock, C. J., and Cochrane, J., considered it should not and Powell, J., that it should issue.

This time the matter went to the Court of Appeals; this court sustained Thorpe, J., and the plaintiff appealed to the Privy Council. The Board, on February 15, 1809, reversed the Court of Appeal. On July 13, 1809, the Court of Appeal of Upper Canada remitted the record to the Court of King's Bench, in order that a writ of execution "should issue against the lands and tenements of the defendant for satisfaction of the plaintiff's debt and judgment," and on July 14, 1809, Mr. Justice Powell had the satisfaction of sitting in court (composed of Scott, C.J., and himself) when a fi. fa. (lands) was directed to issue in accordance with his opinion.

See an account of this case in *Canada Law Journal* (1913), XXIX, pp. 28, 294. The Term Books are in the Ontario Archives, as yet unpublished.

12. (1689) 2 Will & M., sess. I, cap. 5.



that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses."<sup>13</sup>

Cap. 11, providing a permanent place of the sitting of the Common Pleas instead of following the king and being removable at his will, and Cap. 25 for "one measure of wine through the realm, one measure of ale, and one measure of corn . . . one breadth of dyed cloth, russets, and haberjects . . . and it shall be of weights as it is of measures" (*'de ponderibus vero sic sicut de mensuris'*) are interesting. But the most important is the celebrated Cap. 29: "No freeman shall be taken . . . nor will we pass upon him nor condemn him, but by the lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny to any man either justice or right" for "upon this chapter as out of a roote many fruitful branches of the law of England have sprung."<sup>14</sup> This has been supposed to be the law guaranteeing freedom from arbitrary arrest and the right to trial by jury, but those who have such a view had better read McKechnie on the 39th chapter, pp. 436 sqq.

Leaving now Magna Carta we meet the celebrated Charter of the Forest "*Charta Forestae*" made at Westminster, February 10, 1225, which saved many an Englishman from death or mutilation, and many more from beggary.

Passing over the doubtful Statute of Ireland made at Westminster, February 9, 1229, concerning infant coparceners we arrive at the *Provisiones de Merton* or Statute made at Merton, January 23, 1235. Widows are given damages in a writ of dower and the right to bequeath their crops, infants are protected from usurers, and noblemen are prohibited from imprisoning trespassers upon their parks or ponds; and there are a few other provisions now long obsolete. But there are two chapters worthy of notice. Cap. 9 is the celebrated reply of the Barons to the Bishops—"To the King's Writ of Bastardy whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not nor could not answer to it because it was directly against the common order of the church. And all the bishops instanted [i. e., urged] the Lords that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born after matrimony as to the succession of inheritances for as much as the Church accepteth such for legitimate, and all the earls and barons with one voice answered that they would not change the laws of the realm which hitherto have been used and approved." ["*Et Omnes Comites et Barones una voce responderunt quod nolunt leges Anglie mutare que usitate sunt et approbate.*"<sup>15</sup>]

13. *Statutum de Marleberge* (Marlborough), November 18, 1267, cap. 4; *Stat. at Large*, Vol. I, p. 31.

14. Coke, "*Second Institute*," p. 45.

15. The termination "e" in "Anglie," "que," etc., is the usual early form of our "ae."

The last clause has been quoted and approved thousands of times—the “common lawyer” delights in it and considers it one of the most glorious if not the most glorious of all the many splendid declarations of the Parliament of England. But the glory of the “Comites et Barones” seems about to be dimmed even in England. Bills for the legitimization “per subsequens matrimonium” in England were introduced in Parliament in 1893 by Walter McLaren, M. P., and later by Joseph King and Dr. Chapple, M. Ps; the war prevented anything being advanced in that direction for a time, but emphasized the necessity of some action in view of the large number of “war babies.” In 1920 Nevil Chamberlain introduced a bill of many sections dealing with bastardy, one clause enacting legitimization “per subsequens matrimonium.” This particular clause was received favorably by the government and the house; and it is probable that in another year or two the change will be made. The change has already been made in many of the United States and in some parts of Australia; and the rule prevails in all the civil law countries.

The other noticeable chapter is Cap. 10, authorizing every freeman to “freely make his attorney to do suits for him” in “County, Tything, Hundred or Wapentake or . . . the Court of his Lord.” Before the statute one could make an attorney only by Royal Warrant under the Great Seal, and this statute itself does not seem to have been wholly satisfactory, as we find the Statute of Westminster II (1285) 13 Edward I, by Cap. 10, enacting that “Such as have land . . . may make a general attorney to sue for them in all places.” In 1292 the Justices of the Court of Common Pleas were ordered to provide a certain number of attorneys in every county: and in 1402 the Act 4 Henry IV, c. 18, made things all straight by ordering that all attorneys should be examined by the Justices and only those who “were good and virtuous and of good fame shall be received.” Since the last named Act there has been no trouble about lawyers.

Perhaps sufficient has been said to indicate the mine of amusement and instruction in the old Statutes-at-Large—I have referred only to the first twenty pages.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

POSTPONING TRIALS UNTIL END OF LEGISLATIVE SESSION FOR THE BENEFIT OF ATTORNEYS HOLDING SEATS IN THE LEGISLATURE. By St. 1915, C. 86, G. S. 1915, § 6049, the legislature of Kansas provided that no attorney who is a member of the legislature “shall be required to attend the taking of any deposition in any action pending in an court of the state in which he is employed,” except by the court’s discretion. This was a reasonable exemption. But the statute further provided that “any member of the legislature *who may have a case pending* in any court in this state may *have the same continued until the legislature shall adjourn sine die.*” It then clinches the foregoing by enacting that on application to a

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## THE BLACKSTONES IN CANADA

By WILLIAM RENWICK RIDDELL

HENRY BLACKSTONE, Son of Sir William Blackstone

On his death in 1780, Sir William Blackstone, the well-known author of the Commentaries on the Laws of England, left behind him seven children.<sup>1</sup> Of these the eldest, Henry, and the second, James, received a university education. James matriculated at Christ Church, Oxford, in 1781 (being then 16 years of age), graduated B. A., 1784, became a fellow of All Souls' College and B. C. L., 1787, D. C. L., 1792, principal of New Inn Hall, 1803-1831, Vinerian professor of common law, 1793-1824, and assessor in the vice-chancellor's court; he was also called to the bar of the Middle Temple. He died January 7, 1831.

It is, however, Henry, the eldest son, in whom we on this continent are more particularly interested. He matriculated at Queen's College, Oxford, October 28, 1780 (being then aged 17), graduated B. A., 1783, and M. A., 1786.<sup>2</sup>

He came to this continent in 1797 at the age of 34, and on the 2nd of November of that year he became the Comptroller of Customs at St. John's in the Province of Lower Canada. He seems to have been utterly neglectful of his duties as well as insolent to his confreres. Several complaints were lodged against him by the Collector of Customs at St. John's, Mr. William Lindsay (whom he

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1. They were Henry, James, William, Charles, Sarah, Mary and Philippa—the eldest being about sixteen years old at the time of Blackstone's death. Welby's "Lives of Eminent English Judges," Philadelphia, 1846, pp. 355, 356.

The name of the mother of these children was Sarah Clitherow; she had been married in 1761; "Dict. Nat. Biog.," Vol. II, p. 601.

2. The information as to the academic education of these two sons will be found in Foster's "Alumni Oxonienses," Oxford, 1888, Vol. I, p. 118. See also Welby's "Lives, etc.," p. 356, as to James.



had succeeded as Comptroller on Lindsay's promotion) to the Governor's secretary, Mr. Ryland, at Quebec, and to another official,<sup>3</sup> all

3. The letters from Lindsay now extant begin June 25, 1799; they are preserved in the Canadian Archives at Ottawa and are here subjoined:

Custom House St Johns 25th  
June 1799

S. Gale Esqr.

Sir,

I did expect to have had the honor of hearing from you on the subject of my letter of the 14th inst. on account of its being without the Comptrollers signature. Permit me now to mention, that, that Gentlemans conduct, becomes every day more and more extraordinary, for since my last, though his visits have been very frequent in the Garrison during the hours of business, yet he passes, and repasses the Custom House, as seemingly having no concern with the department.

I have long been the drudge in the office. Not that there is too much to do, on the contrary. But as *seven hours* daily attendance is required. Its truly galling to see the Comptroller doing nothing (while in the receipt of his salary & the emoluments of office in the line of fees) and apparently holding the appointment in contempt, for what else can He mean by the continuance of so shameful & wilful neglect of all duty. I have therefore to request youll lay this before His Excellency the Governor General for his consideration and am,

Sir

Your most obedient humble Servant

Wm. Lindsay

Collector.

Endorsed:

William Lindsay Esqr. to Mr. Gale  
St. Johns 25th June 1799  
respecting Mr. Blackstone.

Custom House Port St Johns 30th July 1799

W. W. Ryland Esqr.

Sir,

I did not expect I should be under the necessity of troubling His Excellency the Governor so soon after His arrival, on the very extraordinary conduct of the Comptroller Henry Blackstone Esqr. but yesterday he came to the office in the Hours of business (when I had not seen him, I can truly say for more than these Three Months past, demanding his share of Fees, which I had withheld since my return from Montreal the 17th inst. finding he had not attended to the duties of the office even during that short period a week with a knowledge of my absence, having previously to my departure, sent him a Note to that purpose) When he loaded me with a torrent of abusive language, at last threatened to beat me, and did strike me with a Stick, when a scuffle ensued, but were separated by the Nighbours, however no bones were broke.

Soon after the affray was over, I wrote him on the business that had happened, by the Landwaiter, a Copy of which is herewith.

It therefore becomes absolutely necessary, in my humble opinion, that one of us be immediately removed, or suspended from acting. So that the publick business may not be interrupted for it will now be impossible to carry it on, seeing that both has a right to interfere, under the Commissions we hold. I have therefore to request, youll lay this letter, with the inclosure, before His Excellency the Governor; and hope

in the same tenor. Moreover, the commander of the forces at St.

to receive such immediate relief, as the necessity of the case requires,  
and am  
Sir

Your most obedient humb<sup>b</sup> Servant  
Wm. Lindsay  
Collector.

Endorsed:

From William Lindsay Esqr. to Mr. Ryland  
St. Johns 30th July 1799

Custom House Port St Johns 11th Aug. 1799

W. W. Ryland Esqr.

Sir:

I have remained two Posts in anxious expectation of receiving an answer to the letter which I was under the indispensable necessity of writing you the 30th Ult<sup>o</sup> to be laid before His Exc<sup>y</sup> the Governor; But being disappointed, and waving all other considerations; I do now pointedly charge H<sup>y</sup> Blackstone Esqr. as holding the appointment of Comptroller at this Port, of a Total and wilful neglect of duty for nearly these four Months past. But in particular between the 9th & 17th Ult<sup>o</sup> when I had occasion to be in Town (say Montreal) having informed him thereof by Note previous to my departure during which period I have learnt the publick business at the Custom House was not attended to in manner as it ought.

In consideration thereof, I do humbly solicit His Excellency either to recal, or suspend the Comptroller from acting, but should neither the one, or the other be thought fit, or expedient. I have then to request that His Exc<sup>y</sup> the Governor will be pleased to grant me leave of absence, that may have an opportunity in Person of explaining the ground upon which I now make so just and reasonable a Claim, and am

Sir

Your most obedient humb. Servant  
Wm. Lindsay  
Collector.

Endorsed:

From William Lindsay Esqr. to Mr. Ryland.  
St. Johns 11th August 1799.  
respecting Mr. Blackstone.

(private)

St. Johns 16th Aug. 1799.

Dear Sir:

I must truly confess, I feel myself much hurt after the representation I have made respecting the general conduct of Mr. B—but in particular regarding his non attendance to the duties of the Custom Ho: having in your hands full and ample information thereof. That I should be at this moment without a Scrape of a Pen on that business.

I have now my good friend to say to you that, I'd rather be obliged to Eat bread & water the remainder of my Days, than be longer attached in office with so dangerous and unworthy a Character. If it therefore be His Excellency's wish, or intention, to maintain the Compt<sup>r</sup>. in His appointment I trust He will have the goodness to make some other Provision for me. For I again repeat it, I'd sooner submit to every possible inconveniency, (now situated as I am with a Family) than be under the necessity of having any connection, dealings or communication, with a Person I so heartily and sincerely dispise. I therefore hope through You Sir, that I will be speedily relieved from

John's, Captain E. Cartwright of the 60th regiment, sent a formal

so painful and disagreeable a situation. I am with unchanging sentiments of regard

Dear Sir

Your obliged friend  
and sincere wellwisher  
Wm. Lindsay

W. W. Ryland, Esqr.

Quebec.

Endorsed—Private. From William Lindsay Esqr. to Mr. Ryland  
St. Johns 16th Augt. 1799.

Respecting Mr. Blackstone.

Custom Ho: Port St. Johns 16th Aug. 1799.

W. W. Ryland Esqr.

Sir

I was honored with yours of the 12th inst. inclosing Report of a Committee of the whole Council on the business of Rafts &c. to which will pay due attention, and requesting information why the Kings high way through the Garrison of St. Johns is shut up, and by what authority.

In consequence thereof I waited on Lt.Col. Burrough Commanding at this Port Who informed me, that the order was given by him, not conceiving it proper that Strangers should be allowed to pass through the Garrison at pleasure, besides not deeming it a thoroughfare.

I shall expect to hear from you by tomorrow Post in answer to what I wrote of the 11th for His Excellencys information, failing to which I shall write again by Mondays Post, with Copyes of letters to Mr. Gale of the 14th & 25th June, the latter of which was laid before the Governor General, which letter I do imagine has escaped your notice, else I could have been allowed to remain so long without redress, For by the order of the Governor in Council 7th July 1796 It expressly says In the Section declaring St Johns the Sole Port of Entry

"And that the officers of Customes of and for said Port of St. Johns shall attend everyday (Sundays excepted) in the Custome "House of the said Port for the discharge of the duties of their "office between the Hours of Eight and Twelve of the Clock in "the forenoon and three and six oClock in the afternoon from the "first day of May to the first of October and from Ten to Three from the first of October to the last day of April.

What further is necessary to be said respecting the conduct of the Comptroller at the Port of St. Johns, who living on the spot has not attended to the duties of the office for these four Months past, saving puting His name to my last Quarterly accounts.

I am, Sir,

Your most devoted and very humble Servant  
Wm. Lindsay, Collector.

As showing the terms upon which Blackstone and Lindsay lived and as showing the contempt with which Blackstone was considered by his conferees, I copy here a letter from Lindsay to him:

"Henry Blackstone, Esqr.,

Sir:

In consequence of what pass'd this forenoon in the publick office, and being no stranger to the situation you are in, particularly with some of the officers of the 2<sup>d</sup> Batt<sup>n</sup> of the 60th I do not look upon myself as under the necessity of demanding of You, that satisfaction which one Gentleman has a right to require of another, for assaulting



complaint to the military secretary at Quebec, which is not pleasant reading.<sup>4</sup>

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me in the manner you did. But shall take the earliest opportunity of representing your conduct at the proper quarter, I am,

Sir,

Your humb. Servant,

Custom House Port

St. John 29th July 1799"

4. The complaint to Capt. Cartwright reads as follows (Public Archives of Canada. Lx Regiment, p. 118, Series C. Vol. 931.):

St. Johns April 2nd 1799.

Sir,

I have received your letter of the 28th Ultimo. As I have no instructions from Lieut. Col. De Bernière, & supposing I had no right to interfere in any matter relative to the custom House induced me so long to delay informing you of transactions I could not but conceive improper; and tho' I did inform you after many complaints to me, I did it with reluctance; & not exactly official for the reason before mentioned; the people have long complained of those fees as a grievance, & I am certain *that Tax* on the Inhabitants & the difficulties they met with in passing the Custom House were very detrimental to the settlements on this side of the line. I shall communicate the contents of your letter to me, to such Inhabitants within the line as pass through this place, to whom I assure you it will give the truest satisfaction.

I feel great regret in being obliged to complain of, and acquaint you with the irregular conduct of Mr. Blackstone the Comptroller at this place. Dugmi Lt. Col. DeBernière's command he permitted Mr. Sullivan the Landwaiter to take possession of, & occupy that house in the rear of Mr Lane's House. When Mr Blackstone came here he had the two Chambers over Mr. Sullivan (& which are very good ones) & a room near the present Mess House, the latter he left on his own accord last fall; Mr. Blackstone to my knowledge has repeatedly treated Mr Sullivan with every degree of insolence, & contempt, & a few days ago without the least previous intimation to me, or taking the least notice to me of his intention he drove Mr Sullivan, his wife, and five children (with the most opprobrious & threatening language to turn him out of his office,) into a very small back room, & took possession of the one given him, himself; nay he attempted to carry his point still further, & actually spoke to a carpenter to nail up some doors in the room alluded to, & engaged a man & his wife in the Village to come & live in that room without my previous knowledge. He (Mr Blackstone) has repeatedly insulted Mr Sullivan with the most gross & *unmanly* LANGUAGE? & so far did he carry his ill treatment some time past that Sullivan hurt himself with liquor, became almost insane & ran about the Garrison in search of him. I am sorry to say that, (presuming upon age, & a peaceable disposition), he has treated Mr. Lindsay his Coadjutor in office, with unpardonable language; I can prove this of Mr Blackstone & much more, & his stepping forward to do Mr Sullivan an injury is as illiberal as many other parts of his Conduct; Mr Sullivan has done much of his duty, & Mr Blackstone must acknowledge that he was some months at St Johns before he did any business in the office, & then, he made up his books by copying others. Mr. Sullivan has for some time conducted himself well, is attentive to his business, & from what I conceive & am informed, he is a very useful man in the office; I have been applied to by him in this affair & as Mr Blackstone has a very good *bedroom*, good *sitting-room*, & the use of a kitchen, I hope from any representation he may make, (& he is a very persuasive man) that he may not succeed in

These complaints were effective, and we find Blackstone removed from his position of comptroller; but on November 19, 1799, he became sheriff of the District of Three Rivers in what was then the Province of Lower Canada, but what is now the Province of Quebec.

In this position his conduct seems to have been equally improper and even more scandalous. Complaints were made by several rate-payers ('contribuables') of Three Rivers to the acting Governor of Canada, Sir Robert Shore Milnes. Milnes submitted the whole matter to his Council, who made an inquiry and in May, 1805, presented to him a long report of the facts with the following conclusion:

"That upon the whole matter before him, they, after a careful examination of the various documents and a mature consideration of the evidence produced on both sides, the Committee, are humbly of opinion that the evidence in support of the charges against the sheriff of Three Rivers does not form a sufficient ground for removing him from his office or render it advisable for the public service that another sheriff should be appointed in his room, but the Committee deeply impressed with the necessity that the public confidence in an officer of so great trust as that as the sheriff of that district should be entire, humbly submit to Your Excellency as their opinion that the immediate payment of all public moneys in his hands should be made an indispensable condition before Mr. Blackstone be again permitted to exercise . . . the duties and trusts of his office, and that he should only be allowed to exercise the same on giving security at least to the extent of that originally required."<sup>5</sup>

turning Mr Sullivan out of his quarters in which I have again reinstated him.

I take this opportunity to inform you how exceedingly happy I feel that I have not lost a single man by Desertion during my Command, that only two attempted it (last fall) whom I soon apprehended.

I have the honor to be Sir

Your most humble servant

E. Cartwright

N

Capt. 60th Regt.

Commg

To

Major Js Green

Mily Secy

Quebec

Endorsed—

From Capt Cartwright 60th Regt to Major Green

St Johns 2nd April 1799

Respecting Mr Blackstone and Sullivan

These complaints were sent to Quebec, as that was the official residence of the Governor. General Robert Prescott was the Governor of Canada from April 27, 1797, to August 28, 1807, but during his absence, Sir Robert Shore Milnes, the Lieutenant Governor acted in his stead from July 26, 1799, to August 3, 1805.

5. A copy of this report is obtained from M. Regis Roy, Ottawa, Ontario, through the Dominion Archives. See also Mr. John Ross Robertson's "Landmarks of Toronto," Vol. V, p. 162.



Apparently Blackstone was unable to furnish proper security for the due performance of his duties and so could not fulfil the "indispensible condition"; for we find on May 27, 1805, Charles Thomas was appointed sheriff of Three Rivers in his stead. He continued, however, to reside in Three Rivers; the traveler, John Lambert, thus speaks of him in 1806:

"A son of the celebrated Judge Blackstone occupied the office of sheriff a few years ago, but in consequence of some inattention to the duties of the situation was superseded. I have been told that Mr. Blackstone was rather harshly treated in that affair. He still resides at Three Rivers as a private gentleman, upon a small annuity. He was educated at the University of Oxford, and is said to be possessed of considerable abilities."<sup>6</sup>

There does not seem to be the slightest foundation for Lambert's statement or suggestion that Blackstone was harshly used. In 1811, May 1, he was appointed coroner of the district of Quebec, which position he held until his death, February 2, 1825.

The Quebec Mercury of February 5, 1825, (on which day Blackstone was buried) says (I translate)—

"At ten o'clock, P. M., last Wednesday, at his house in Quebec, after a severe sickness supported with courage and resignation, died Henry Blackstone, Esq., for several years His Majesty's Coroner for the District of Quebec. The talents and the zeal of Mr. Blackstone in the execution of his duties have never been surpassed, and the city loses an accomplished gentleman."<sup>7</sup>

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6. "Travels through Canada and the United States of America in the years 1806, 1807, and 1808," by John Lambert, 2nd edition, 1814, Vol. I, p. 495. John Lambert was an Englishman who in 1806 came to the British North American Colonies under the sanction of the Imperial Board of Trade in order to foster the cultivation of hemp then required for ships. The supply of hemp from the Baltic regions had been greatly endangered by the 'Baltic Decree' of Napoleon and Britian began to look to her colonies for a supply. The early history of both Canadas is full of schemes for the promotion of hemp culture.

The edition from which I quote is not that specially mentioned in the Dict. Nat. Biog.—it is in two volumes, published by C. Craddock and W. Joy, 32 Paternoster Row, London, 1814—my copy is in half-morocco, bound by Zaehnsdorf. Lambert was an accurate observer and apparently quite impartial. I am unable, however, to join the Dict. Nat. Biog. in saying that his work is of much value.

7. Dr. Henry J. Morgan in his "Sketches of Celebrated Canadians," Quebec, 1862, says of Blackstone, p. 152, "the superior talent and zeal of this gentleman in the discharge of his functions have not been surpassed, and the community was deprived by his death of an accomplished individual." This eulogy seems to have been taken from the *Mercury*. 'De mortuis nil nisi bonum' is a good motto for compilers of biographies, but nothing appears to show any real public merit in Blackstone's whole career. Foster is in error in saying (loc. cit. note 2 *supra*) that Blackstone died in 1826, s. p. He died in 1825 with issue as will be made to appear in this article *infra*. Blackstone seems to have been in very bad repute in Three Rivers



HENRY WILLIAM BLACKSTONE, Grandson of Sir William Blackstone

Henry Blackstone married at Three Rivers, July 22, 1801, Charlotte Heney, widow of Pierre André Godefroi de Tonnancour, a lieutenant in the Indian Department. She survived him for twenty years and died in Three Rivers, June, 1845, aged 74 years. They had one child,<sup>8</sup> Henry William.<sup>9</sup> He attended the Royal Grammar School at Quebec and afterwards lived at Chambly, Lower Canada. Why and how he was induced to come to the Upper Province is not known, but from the records of the Law Society of Upper Canada it appears that at a convocation<sup>10</sup> of the Law Society of Upper

largely due to his habits of gross intoxication, excessive even for that bibulous period; he left that city without a friend. When drunk he would beat his wife, using sometimes a horsewhip; and at length her son by a former marriage brought the matter before the courts, and, July 2, 1816, there was passed between husband and wife a notarial deed of 'separation de corps et des biens.' (Robertson's "Landmarks," Vol. V, p. 163, mistakes the date of this deed for that of the marriage.)

Public rumor did not hesitate to accuse Blackstone of the murder of his predecessor in Three Rivers, Antoine Isidore Badeaux,—they had spent the night in drunken orgy and in the morning Badeaux was found hanging by the neck to the stair upright or 'bannister' in the hall quite dead. No legal evidence, however, was adduced to prove Blackstone's guilt. (Ex relatione Benjamin Sulte, Esq., F. R. S. C.)

8. She had borne her previous husband two children, a son and a daughter; it is noted in the records of the Executive Council at Quebec (for Lower Canada) that:

"On the 6th March, 1819, Charlotte Heney, widow of Pierre Godefroi de Tonnancour (then wife of Henry Blackstone) prayed for a grant of land for herself, son and daughter as a reward for the services of her late husband, a lieutenant in the Indian Department. She was recommended for a grant of 400 acres for herself and 200 for her daughter, Charlotte de Tonnancour, on the 3rd December, 1819, by a Committee of the Executive Council. This recommendation was approved on the 8th of the same month."

Charlotte Heney was a relative of Hughes Heney, one of the most prominent men of the Province of Lower Canada during the first half of the nineteenth century. He was born on the 19th December, 1791, elected to the Legislative Assembly of Lower Canada for the constituency of Montreal East, on the 11th April, 1820, and sat there until the 28th February, 1832, when he resigned. On the 28th January, 1833, he became a member of the Executive Council, which high post he filled until the Union in 1841; he died on the 13th January, 1844. Mr. Heney had held many public appointments; he was a Justice of the Peace, a School Visitor for the counties of St. Maurice and Champlain, a commissioner for the erection of parishes, Grand Voyer for the district of Trois Rivières, a commissioner to administer the oath of allegiance, a commissioner or judge for the trial of small causes, etc., etc.

9. It will appear later in this paper how his name came to be written sometimes as "William Henry." See note 21, *post*.

10. The Law Society of Upper Canada (still in full vigor) was instituted by statute in 1797 and formally incorporated in 1822; it is composed of all the barristers and entered students at law; its governing body is composed of benchers, some elected, some *ex officio*; the Benchers meet in 'Convocation.' In 1831 the Law Society had no control over attorneys, having been relieved of that charge by the Act of 1822, but then, as now, had

Canada, held in their library, on Tuesday, April 19, 1831, being in Easter Term, 1 William IV—

"The Solicitor General, Mr. Hagerman,<sup>11</sup> gave notice that Mr. Edward Hitchins, of Oxford, England, Mr. Brownlow Roberts, of Kingston, Mr. William Henry Blackstone, of Chambly, Lower Canada, Mr. Munro Bailey, of Three Rivers, and Mr. Alexander Dobbs of the County Antrim, Ireland, would be proposed next term to the Society for admission on the Books as Students:"

and the following term, being Trinity Term, 1 & 2 William IV, at a convocation held in the same place, on Tuesday, June 21, 1831—

"Mr. William Henry Blackstone, Mr. Edward Hitchings, Mr. James Scott, Mr. Simon F. Robertson, Mr. George Glassford, Mr. Alexander Grant<sup>12</sup> and Mr. William Boswell, pursuant to notice of last term, presented themselves for admission on the Books as Students, and having delivered their certificates<sup>13</sup> as required and paid their dues

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full jurisdiction over students-at-law, the course of studies, call to the bar, etc., as well as over barristers. Since 1797 no one may address a court of this Province as counsel who has not been called to the bar by the Law Society of Upper Canada.

In 1857 the Law Society was again given jurisdiction over attorneys, and since that time the Society lays down the curriculum for that branch of the profession, examines the candidates, and to the successful gives a 'Certificate of Fitness' on the production of which before a judge the applicant is 'admitted' and sworn in as an attorney (now the name 'solicitor' is used).

11. Christopher Alexander Hagerman, Solicitor General, July 13, 1829; Attorney General, March 23, 1837; temporarily appointed Puisne Judge of the Court of King's Bench, June 26, 1828, but soon removed, permanently appointed February 15, 1840, and so remained till his death, May 14, 1847. He was a sound lawyer and an accurate, painstaking judge; before his election to the bench he was especially celebrated as a Boanerges of a counsel and a bigoted partisan politician.

12. Afterwards the well known reporter of the Court of Chancery of Upper Canada and of the Court of Error and Appeal.

13. In 1799, a rule was passed that to have one's name entered in the books of the Society as a student, his name and description must be given at a meeting of the benchers by his master or intended master, with a declaration by the master or intended master upon honor that the said person is or has been his articulated clerk and shall have served as such and that in his opinion he is qualified by education, principles and habits of life to become a member of the Society and is really and bona fide to be or has been a clerk of him the said master or intended master.

This was first changed in 1819. In that year, 1819, Hilary Term 60 Geo. III, a Rule No. 18 was passed and approved by the judges (Powell, C. J., Campbell and Boulton, JJ.), requiring all persons applying for admission to the Society to give a written translation in the presence of the Society of a portion of one of Cicero's orations or perform such other exercises as should satisfy the Society of their acquaintance with Latin and English composition.

Then, in May 3, 1828, a rule was approved which did away with the necessity of a student producing the certificate of the master, actual or intended, to whom he was or was to be articulated. All that was necessary thereafter (until after Blackstone's admission) was a certificate of a bencher.

Blackstone narrowly escaped being called upon to pass an examination for entrance, as a few months after his admission and on July 2, 1831, the



and having satisfied the Society of their qualifications, they are admitted as Students accordingly."<sup>14</sup>

In Hilary Term, 7 William IV, at a meeting of convocation held in their convocation chamber, at Osgoode Hall, Monday, February 6, 1837,<sup>15</sup> the Treasurer<sup>16</sup> laid on the table the petition and presentation with his report thereon and therto annexed of Mr. Henry William Blackstone and others who had the standing on the books as students of the laws required for the purpose of their being called to the degree of Barrister-at-Law; and Blackstone was called in and his examination<sup>17</sup> proceeded with. After the completion of his examination he withdrew, and on consideration—

"It was ordered that the said examination as had be received and passed and that the said Henry William Blackstone be called to the degree of Barrister-at-Law and the said Henry William Blackstone is hereby called to the degree of Barrister-at-Law accordingly. Mr. Blackstone was then called in and informed of his Call."<sup>18</sup>

On February 13, 1837, Blackstone was presented to the Court of King's Bench at Toronto, Upper Canada, and signed the roll of

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benchers passed another rule approved by the judges, November 19, which required every candidate before he was admitted as a student and before being called to the bar, to be examined, and—

"upon full and strict examination in open Convocation . . . found . . . to be . . . duly qualified to be admitted on the books as a student-at-law, or to be called to the bar, respectively, as the case may be."

14. The quotation is from Minute Book of the Law Society of Upper Canada, Vol. II, pp. 195, 196.

15. It was at that time and is (except in the case of graduates in arts or law) still necessary for a student-at-law to be five years on the books of the Law Society before being called to the bar.

At that time a rule was in force which had been passed, January 11, 1828, and which required all students thereafter entered on the books of the Society to keep at least four terms at York during their five years' entry. This rule was rigidly enforced and many students lost their year by not keeping the terms properly; it may be that Blackstone lost a year from this cause, as he had completed his five years in 1836.

16. From the beginning, the 'treasurer' did not simply care for the funds of the Society; he was also the head of the Society, president and chairman. This was an adoption of the terminology of the English Inns of Court. See, for example, Herbert's "Antiquities of the Inns of Court and Chancery," 1804, p. 228:

"The office of Treasurer is of considerable importance . . . He is the Supreme Officer of the whole Society and has the regulation of its concerns. He admits gentlemen into the Society, etc."

The treasurer at that time was Robert Sympson Jameson (husband of the well known authoress, Mrs. Anna Jameson), Attorney General, who on March 23, 1837, was appointed the first vice chancellor of the Court of Chancery for Upper Canada, established that year by 7 Will. IV., c. 2 (U. C.).

17. The examination was made compulsory by the Rule of July 2, 1831, referred to in Note 13 supra. The examination was not a mere matter of form, several instances occur of rejection of the candidate for call.

18. Minute Book of the Law Society of Upper Canada Vol. II (the second part).



barristers, being No. 166 on that roll. Upon the same day he was admitted as an attorney<sup>19</sup> in the Court of King's Bench and signed the King's Bench roll of attorneys, being 211 on that roll. In the new alphabetical roll made up for convenience, June 23, 1891, of attorneys of the Queen's Bench, he appears as No. 90. The court of chancery not yet having been organized,<sup>20</sup> he did not sign the roll of solicitors in chancery, but under the Act had the power to act as such when the court was organized later on in the same year. He appears in the common roll of the Law Society prepared by the Select Committee of Benchers in Convocation, Trinity Term, 1832, and its continuation, as No. 229 of the members of the Law Society; in the Law Society's roll of barristers he appears as No. 195.<sup>21</sup> On his graduation, he settled in Newmarket, where he practiced for four or five years, and then removed to the village of Holland Landing in the Township of East Gwillimbury in the County of York and Province of Upper Canada. Holland Landing is still a very small place and was then smaller. He attained no eminence in his profession and his name does not appear in the reports. He died

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19. When the Law Society Act was passed in 1797 there was no real distinction of barrister and attorney; all practitioners of law were called 'advocates' and sometimes 'barristers.' That act contemplated barristers and attorneys and made different provisions for the two classes; but there has never been a rule in this Province like that in England that the same person might not be both barrister and attorney. As a matter of fact, all but a very few have always been of both branches. An attempt was made by the benchers of the Law Society in 1830-1831, to introduce the English system, but the judges refused to approve the rule; an application to the legislature in 1841 was equally unsuccessful.

The member of the "lower branch of the profession" who practised in the common law courts was an 'attorney'; he who practised in the court of chancery was a 'Solicitor.' The Law Society Act of 1797 contemplated the erection of a court of chancery and provided for the solicitor as well as the attorney.

As we have seen, the Court of Chancery first saw the light in 1837; the Act of 1837, 7 Will. IV, c. 2, by sec. 12, provides that—

"all barristers and attorneys admitted to practise in the Courts of Common Law in this Province shall be permitted to practise in the Court of Chancery . . . as Counsel or Solicitor respectively."

There were thereafter some few who confined their practice to either common law or chancery, but most of both branches of the profession practised in both courts.

20. An agitation for a court of chancery began shortly after the institution in 1794 of the court of King's Bench; this was renewed from time to time but we had no court of chancery in this Province till the statute of 1837, 7 Will. IV, c. 2 (U. C.) finally passed March 4, 1837.

21. By reason of the mistake made in 1831 when he became a member of the Law Society as a student, his name appears on the common roll of members as "William Henry Blackstone," but his signature was always "H. W. Blackstone," and that his name was Henry William there can be no doubt. Curiously enough his widow in her application for letters of administration calls him "Henry" Blackstone and that name is used in all the proceedings therein in the Court of Probate.

August 20, 1852, without issue, thus ending the House of Blackstone in Canada.<sup>22</sup> He left a widow, Margaret Ann Blackstone,<sup>23</sup>

22. The only thing apparently by which he is remembered was his building of the Blackstone House, a dwelling of red brick with a tin roof, the first of its kind in the district—the house still stands, but a subsequent owner removed its glory, the tin roof.

Mr. J. R. Cotter, County Crown Attorney at Barrie, who as a lad was a neighbor and knew him well at Newmarket, describes as a man of medium height, heavy build, dark hair, and pale complexion. He was the envy of all the young from his skill in skating, no doubt due to his Quebec experience as a youth. He could write his name with his skates in the ice. A man of fine musical ability, both vocal and instrumental, he would spend whole evenings at the piano and in singing; he was a leading member of the choir of the Church of England.

He was considered a man of some learning and ability; but had his father's failing of inebriety which interfered with any real success in his profession. Dr. Scadding ("Toronto of Old," p. 485) is too laudatory in his statements—

"At Newmarket not very many years since was successfully practicing a grandson of Sir William Blackstone, the Commentator on the Laws of England, Mr. Henry Blackstone, whose conspicuous talents gave promise of an eminence in his profession not unworthy of the name he bore. But his career was cut short by death."

He also followed in his father's footsteps in another particular. He married Ann Henderson, daughter of Col. Henderson, who farmed a lot of two hundred acres near Holland Landing, the property of Chief Justice Sir Beverley Robinson. She was a woman of the highest character and pleasant disposition; and when he was sober he was a devoted and indulgent husband. But when intoxicated he abused her with tongue and fist—so much so that not infrequently she was forced to take refuge in a neighbor's house for the night. They had two children, Mary Florence, born Nov. 14, 1844, and Charlotte Ann, born Aug. 7, 1846—both died in infancy.

Holland Landing was at the time much frequented by rough characters from the backwoods and elsewhere and Blackstone did not hesitate to carouse with them. Whiskey was cheap, and excess in drink not yet disgraceful. All the reasons for drinking were held valid:

There are five reasons why men drink,  
Good wine, a friend, or being dry,  
Or lest you should be by-and-by  
Or any other reason why.

(Substituting "whisky" for "wine" and omitting "good.")

One evening drinking and playing cards with a rough lot in Playter's Tavern at Holland Landing, a quarrel arose amongst the carousing gamblers in which Blackstone received a fatal blow. Taken to his home he died August 20, 1852, and was buried in the Newmarket Church of England cemetery—the last of his name on this continent. A somewhat notorious character named Bill Dwyer was generally believed to be the person who struck the fatal blow, but a coroner's jury found no evidence to implicate him and no one was punished for the crime.

23. From the original papers on record at Osgoode Hall, Toronto, it appears that September 20, 1852, Margaret Ann Blackstone of the City of Toronto, in the County of York, widow, presented her petition to the Governor General who was at that time Judge of the High Court of Probate for Upper Canada, wherein she set out that "Henry Blackstone, late of the Township of East Gwillimsbury, in the County of York, Esquire, deceased, departed this life on or about the 30th day of August, 1852," and that he died intestate, leaving the petitioner, his widow, him surviving. She asked for Letters of Administration to his estate, which were granted to her Sep-

who was granted letters of administration of his estate.

tember 20, 1852, after she had procured proper security. The inventory which was filed of his personal property showed that he was not very well off. As a matter of curiosity I copy it hereunder:

"Inventory of Goods Chattels rights and credits which were of the late Henry Blackstone at the time of his death who died intestate viz:

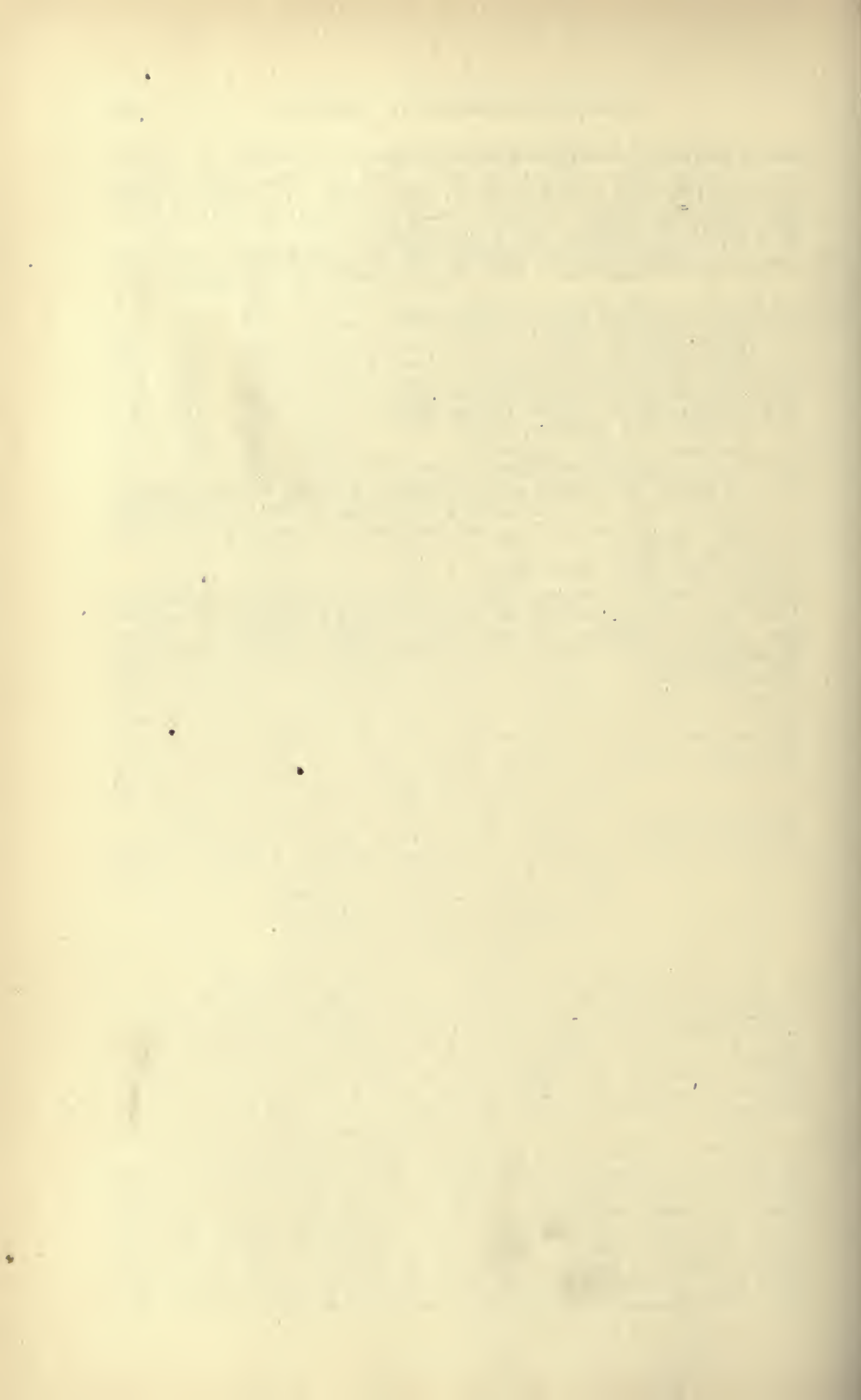
	£	S.	D.
"A few old clothes and small items (say).....	5	0	0
Money found in Intestate's pocket.....	3	15	0
Gold Watch and Seal.....	20	15	0
Law and Miscellaneous Books .....	5	0	0
Mortgage Jacob Anderson, amount due.....	10	11	3
Mortgage W. K. Osborne, amount due.....	27	11	8
Mortgage Alex Cameron, amount due.....	16	13	0
Mortgage Geo. Reid, amount due.....	38	17	6
Notes and book debts, about the sum of .....	400	17	6

Memo: It is impossible at present to ascertain the exact amount due and owing on book accounts and notes, as many of the claims made are disputed on the ground that they have been paid to Intestate in his lifetime.

Toronto. March 19th. 1853"

The £ was the Currency, Halifax, Quebec, or Canadian £ worth \$4.00. It has been already noted that his widow calls him throughout the proceedings "Henry" Blackstone and not "Henry William" Blackstone. See the original papers in the office of the Surrogate Clerk at Osgoode Hall, Toronto, 1852, K. 709.





# ILLINOIS LAW REVIEW



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By

Elijah N. Zoline

OF THE NEW YORK BAR

*Author of*

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have adopted, is that one joint obligor cannot bind the others by any promise or part payment. The third view, adopted by the United States Supreme Court, is that an acknowledgment made by one joint promisor before the statute has become a bar extends the time within which action may be brought against all jointly liable. However, once the statute bars the action, the right to recover cannot be revived by any action by a joint promisor as against the others. Except as to themselves, guarantors and indorsers, not being joint obligors, can in no jurisdiction, by any act, extend the statute or revive a right once barred. A surety who pays the obligation of his principal may recover indemnity from him, or contribution from his co-sureties for any portion above his share. The statute of limitations begins to run in favor of the principal at the time the surety makes payment, and in favor of the co-sureties from the time the surety pays more than his share of the obligation.

## WHY PICKWICK WAS GAOLED

BY WILLIAM RENWICK RIDDELL

A young Toronto barrister the other day raised the question, Why was Pickwick imprisoned? I attempted to answer the question; and it has occurred to me that others may have been puzzled in the same way and may conceivably be glad of the explanation.

The celebrated action of *Bardell v. Pickwick*—probably the best known action in the world—was begun by writ of *capias ad respondendum*, August 28, 1830, the 'original writ' still theoretically the first process having for more than half a century been omitted except where outlawry was intended. Pickwick was not given the chance by the eminent firm of Dodson and Fogg, attorneys<sup>1</sup> of His Majesty's courts of King's Bench and Common Pleas at Westminster and solicitors of the High Court of Chancery, to settle before action; but he received a letter from them when he was at the "Angel," Bury St. Edmunds, asking the name of his attorney in London who would accept service of the writ. That he should at once say that it was "a base conspiracy between these two grasping attorneys" was to be expected—no one likes to be sued and the lawyer is always blamed.

It was not intended actually to arrest the defendant—that could be done only on an affidavit made and filed in an action where the cause of action was originally at least fifteen pounds<sup>2</sup> (except on bills of exchange and promissory notes).

The actual arrest was intended and effected in the well-known case of *Weller v. Weller*. The unfortunate if facetious Samuel Weller in all innocence borrowed twenty-five pounds from his father: that "unnat'ral wagabone" demanded its return, "five minits arterwards"; Samuel refused, said "I von't pay" and cut up rough. Solomon Pell, an attorney whose practice lay in bankruptcy and who, though he had no fixed office, was a particular friend of the Lord Chancellorship's who would "be damned if Pell could not get anybody through the insolvent court," was consulted. Pell had "got brains like the frogs dispersed all over his body and reachin' to the wery tips of his fingers"; he seized the situation at once, "led the

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1. "His Majesty's attorneys of the courts of King's Bench, etc.," as the reporter has it.

2. See the statutes (1811) 51 Geo. III C. 124 s. 1, (1817) 57 Geo. III C. 101.

elder Mr. Weller down to the Temple to swear to the affidavit of debt," which Pell's "boy with the assistance of the blue bag<sup>3</sup> had drawn up on the spot." The "cruel pa" did not relent, the officer arrived and the defendant was without delay arrested and delivered into the custody of the Warden of the Fleet.

Pell's bill of costs must be considered most moderate—he received "three ten and one ten . . . five" for his services in incarcerating this "reg'lar prodigy son"—when one remembers another celebrated attorney, Mr. Quirk of Quirk, Gammon and Snap, who had "never been seen to shed a tear but once—when five-sixths of his little bill of costs, £196, 15s, 4d, was taxed off in an action on a bill of exchange for £13,"<sup>4</sup> or indeed Mr. Fogg himself, who in the action of *Bullman v. Ramsey* for £2, 10 made up a bill of £3, 5 even before declaration filed—of course it must be remembered that Fogg was essentially benevolent, for, "with a sweet smile on his face," he said (after refusing the amount as not enough): "It's a Christian act to do it . . . for with his large family and small income he'll be all the better for a good lesson against getting into debt"; and he "smiled so good naturedly as he went away that it was delightful to see him."

Samuel was wholly justified in insisting that there was to be "no vispering's to the Chancellorship, none o' them unconstitootional ways of doing it," and everything was quite regular; he could assure Pickwick that he was "a pris'ner . . . arrested this here very artemnoon for debt" at the instance of a man that "ull never let me out, till you go yourself."

But nothing of the kind occurred or was contemplated in Pickwick's case; he had to be served with a writ, unless an attorney accepted service and undertook to appear. Pickwick did not answer the letter of Dodson and Fogg of August 28, 1830, but came up to London, Thursday, September 2nd; and next day he called upon the attorneys at Freeman's Court, Cornhill; as he offered no terms, he was served with a copy of the writ, the original being shown him at the same time.

He used language much to be reprobated—actionable, indeed—toward and of these eminent practitioners; and he might well have got himself into an "action on the case for defamation." He left

3. In this Province, attorneys, solicitors and their clerks were allowed to carry only black bags; barristers (not K. C.'s), blue; K. C.'s, red; and judges, green bags.

4. *Samuel Warren* "Ten Thousand A-Year" cap. vi.



saying, "You shall hear from my solicitor,"<sup>5</sup> and went to see Mr. Perker of Gray's Inn. He being away from town for a week, Pickwick saw Mr. Lowten, his clerk, and left the copy of the writ with him with instructions to defend.

No Special Bail being required, a "common appearance" was entered with merely nominal sureties, "John Den and Richard Fen"; then followed declaration by plaintiff, plea by defendant and replication by plaintiff, issue.<sup>6</sup>

The case was set for trial at Guildhall by a Special Jury—nothing so common as a common jury for Dodson and Fogg and their eminent Counsel, Serjeant Buzfuz—"in the settens after Term," February 14, 1831; and Pickwick's friends, Snodgrass, Tupman, and Winkle with his servant, Samuel Weller, were subpœnæd on behalf of the plaintiff in the early part of January. Weller next morning sagely observed that the day set for the trial was a "remarkable coincidence . . . Walentine's day . . . reg'lar good day for a breach o' promise trial."

The judge was Mr. Justice Stareleigh,<sup>7</sup> "a most particularly short man and so fat that he seemed all face and waist-coat": Counsel for the plaintiff, Serjeant Buzfuz<sup>8</sup> and Mr. Skimpin; for the defendant, Serjeant Snubbin and Mr. Phunky.

5. Someone's mistake—Mr. Pickwick's or the reporter's. "Solicitors" did not practise in the common law courts; their court was chancery. Attorneys practised in the common law courts; generally an attorney was a solicitor and vice versa. Dickens speaks of Perker again as Pickwick's solicitor in the interview with Mr. Serjeant Snubbin; also after the trial.

6. When our court of King's Bench was established in 1794 by the Act of 34 George III C. 2 (U. C.) with the jurisdiction of the courts at Westminster, it was provided by sec. 5 that "the original and first process . . . shall be by writ of *capias ad respondendum*," and that no one was to be held to special bail or arrested unless on an affidavit of debt in a sum certain and setting out that the defendant was about to leave the Province with intent to defraud his creditors: Sec. 6. The formality of "original writ" was not provided for and never was in use in Upper Canada even when outlawry was desired.

7. Of course, Mr. Justice Sir Stephen Gaselee, appointed to the court of Common Pleas 1824, resigned in 1837 and died 1839, aged 77, "a painstaking and upright judge and in his private capacity . . . a worthy and benevolent man."

8. The serjeants-at-law still had the valuable monopoly of counsel practice in term time in the court of Common Pleas; but this was not in term but a trial court of *nisi prius*. The special privilege, Campbell, when Attorney General, attempted to abolish by royal warrant in 1834; it was obeyed for a time, but on argument was held to be ineffective: 10 Bing. 571, 572; 6 Bing. (N. C.) 235-239. During the delivery of the judgment "a furious tempest of wind prevailed which seemed to shake the fabric of Westminster Hall and nearly burst open the windows and doors of the court of Common Pleas." The privilege was abolished in 1846 by the Act 9, 10 Vict. C. 54. The judges addressed serjeants as "brother" as by custom until 1873, everyone before being made a judge was made a serjeant.

The special jury not all turning up, a sensitive greengrocer and a philosophical if pessimistic chemist were sworn in as talesmen.

There is no need to say anything of the trial; neither of the parties did or could give evidence. It is true that in an occasional local court in England and in certain inferior courts in Upper Canada (from 1792) the evidence of plaintiff and defendant was allowed; but it was not till 1851 that the superior courts were allowed to permit parties to give evidence.<sup>9</sup>

A verdict went for the plaintiff for £750; the elder Weller "know'd what 'ud come of this here mode o' doin' business," and lamented, "Vy worn't there a alleybi?"

Pickwick vehemently asserts to Dodson and Fogg, "Not one farthing of costs or damages do you ever get from me, if I spend the rest of my existence in a debtor's prison," and is told that he will think better of it before next term.

Two months must elapse before the judgment could be entered up for the amount of damages and costs—final judgments could be entered up only on the *postea*, i. e., the entry of the verdict of the jury which was endorsed on the back of the record at *nisi prius*. In the common pleas, where the action was tried in London as this was, an officer of the court, "the associate," kept the record with the *postea* endorsed on it in his own custody until the fifth day of the following term. This was to allow the losing party to move in term against the verdict for a new trial, etc., etc.

But the inevitable fifth day of Trinity term<sup>10</sup> arrived; Dodson and Fogg received the record and entered up judgment on the *postea* for £750 damages and costs taxed at £133, 6, 4, as Mr. Fogg said some time later when with considerable native humour he was for

9. Our act giving the Courts of Requests with jurisdiction in debt up to 40 shillings Quebec currency (36 shillings sterling) the right to administer an oath to the plaintiff or defendant is (1792) 32 George III C. 6 (U. C.), and is the first statute of which I have any knowledge in any English speaking country giving that power. The English legislation is (1846) 9, 10 Vict. C. 95, for certain courts (1851) 14, 15, Vict. C. 99, the general Act, and (1869) 32, 33 Vict. C. 68. See my judgment in *Boyle v. Rothschild* (1908) 16 Ont. Law Rep. 424.

10. The terms for 1831 were regulated by the act (1830) 1 Will. IV C. 70 s. 6. Hilary Term began January 11, ended January 31. Easter Term began April 15, ended May 8. Trinity Term began May 22, ended June 12. Michaelmas Term began November 2, ended November 25.

Dickens is therefore astray in his terminology and dates. The trial being held February 14, the *postea* would be delivered to the plaintiff and judgment entered on the fifth day of Easter Term, not in Trinity Term at all. The Original Terms were: Hilary, January 23 to February 12. Easter, Wednesday after Easter Day to Monday three weeks after. Trinity, Friday after Trinity Sunday to Wednesday fortnight. Michaelmas, November 6 to November 28.



making "Mr. Pickwick pay for peeping." And now Mr. Pickwick must pay up or stand the consequences.

My young Toronto friend found his difficulty just here—he truly said the attorneys (he from habit called them "solicitors," as we have had no attorneys-at-law since 1881) had no ill-will towards Pickwick, they did not wish to punish him, all they wanted was their money. That they had no feeling against Pickwick is certain; Dodson, "a plump, portly, stern-looking man with a loud voice," and Fogg, the man of business, "an elderly, pimply-faced, vegetable-diet kind of a man," both on their first interview with Pickwick had "an air of offended virtue" and looked upon his conduct towards their client, Mrs. Bardell, with grave disfavour—they rather welcomed his most slanderous epithets, and did not bring an action of libel against him. After the trial they jested with him; Dodson laughed and Fogg grinned, when Pickwick was speechless with indignation; and when Pickwick became willing to pay up, they were more than glad to let him have his freedom: Nay, they saluted him cordially, solicitously asked as to his health, expressed great happiness on making his acquaintance and great concern on hearing that he had been "persecuted and annoyed by scoundrels of late." Dodson expressly said that he bore no ill-will or vindictive feeling toward Pickwick; and Fogg warmly concurred in a most forgiving manner—all this courtesy, good nature and charity while the payer was flashing forth looks of fierce indignation, restraining his wrath by gigantic efforts, with the blood tingling in his cheeks, refusing to give his hand, charging the attorneys with insolent familiarity and ending up with calling them "a well-matched pair of mean, rascally, pettifogging robbers." They were even willing to let Pickwick assault them—or at least each was willing to let Pickwick assault the other—without returning it.

Men of that forgiving Christian temperament—for it is not necessary to recall Fogg's Christian act toward the rash debtor, Ramsey, to enable one to recognize the character of these men—men of their temperament could have no ill-will toward anyone and it *was* only their money they wanted.

As the defendant was a man of means, there would nowadays be no difficulty in making the money. If he did not pay up he would be examined as a judgment debtor,<sup>11</sup> the property or means he had for satisfying the judgment would be disclosed, the debts due him, the money he had in banks—he was forever signing cheques—found

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11. Ontario Rule 580; English Rule 610; in Ontario without, in England with, an order of the court or judge.



out. Then would follow seizure of stock in companies, attachment of debts, etc. All that was far in the future.

There was no way of finding out what property or means this debtor had. The "Lords' Act" (1758) 32 George II, c. 28, had provided that the creditors of a judgment debtor charged in execution for a debt under £100 might compel the debtor on pain of transportation for seven years to make a discovery and surrender of his effects for their benefit and then obtain his release; and legislation in 1793 extended these regulations to debts of £300; but the judgment in *Bardell v. Pickwick* was for £750, and these Acts did not apply.<sup>12</sup>

The common law "coeval with civilized society itself . . . formed from time to time by the wisdom of man"<sup>13</sup> thought to be the perfection of human reason, even if Blackstone did not say so, never so much as thought of anything so simple and sensible for the discovery of assets: it was not until 1854 that such a practice was provided for. The Common Law Procedure Act of 1852, 15, 16 Vict., c. 76, more than deserved its title, "An Act to Amend the Process, Practice and Mode of Pleading in the Superior Courts of Common Law at Westminster . . ."; it was revolutionary, rather than amending, but it was not sufficiently revolutionary to give such relief to a creditor. But Parliament had got going and The Common Law Procedure Act of 1854, 17, 18 Vict. c. 125, by section 60, provided for an examination of a judgment debtor in almost the same language as the present English Rule 610.<sup>14</sup>

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12. The "Lords' Act" was so called because it originated in the Upper House. It was rather intended for the relief of debtors in prison; the Act of (1786) 26 George III C. 44, enlarged the provisions to debts of £200; that of (1793) 33 George III C. 5, s. 3, made perpetual by (1799) 39 George III C. 50, to those of £300.

Of course, a bank account is in law nothing but a debt owed by the bank to the depositor; once money is deposited, the money itself is the money of the bank, and a debt is established from bank to depositor: *Foley v. Hill* (1848) 2 H. L. Cas. 28.

13. Lord Kenyon in *Rex. v. Busby* (1801) Peake 193.

14. Upper Canada did not lag behind. "The Common Law Procedure Act" (1856) 19 Vict. C. 43 (Can.) followed closely the English Acts of 1852 and 1854; then followed the amending Act of 1857, 20 Vict. C. 57 (Can.), consolidated in 1859, C. S. U. C. C. 22.

There were subsequent English Acts, e. g. (1860) 23, 24 Vict. C. 126 (Imp.), and Canadian Acts; but I do not pursue the inquiry further.

The practice in Upper Canada (now Ontario) under these acts is fully, minutely, and accurately described in *Harrison* "Common Law Procedure Act" Toronto, 1858, by Robert A. Harrison, afterwards Chief Justice of Upper Canada, whose judgments always "collected all the authorities." In England, perhaps *Finlason* "Common Law Procedure Act" (eds. 1855 and 1860) gives as good an account as any; *Quain and Holroyd* (1852) does not cover the Act of 1854; *Markham* "Common Law Procedure Acts" (3rd ed. London 1864) is a useful manual.

Even if there had been any way of finding out Pickwick's assets, there was no way of making them available to pay the judgment—there was no such thing as attachment of debts at the common law—that also came into existence in England by The Common Law Procedure Act of 1854, closely followed in this as in other respects by the Canadian Act of 1856.

Nor could debts be seized under a writ of execution against goods—a writ of fieri facias (or Fi. Fa., as it is generally called). This was a common law writ directed to the sheriff to cause to be made of the goods and chattels of the debtor the amount of the judgment and costs. The delightful pages of Tidd's Practice—"Oh, what a writer Mr. Tidd is!"<sup>15</sup>—will tell us what could be seized under a fi. fa. at that time. No money (except money in the possession of the defendant), no bank notes, nothing but goods and corporeal chattels capable of sale. It was not until 1838 that the law was changed: in that year by the Statute 1, 2 Vict., c. 110, s. 12 (Imp.), the sheriff was enabled to seize under a fi. fa., money, bank notes, promissory notes, and other securities for money, and sue on the securities: in 1840 by the Statute, 3, 4 Vict., c. 82, stock or shares in companies could be charged with the payment of the debt—but an ordinary debt from a third person could not be reached in that way.<sup>16</sup>

Pickwick had apparently no land and so the writ of Elegit, or that of Levari Facias was of no avail<sup>17</sup> in his case. "Equitable

15. Teste Uriah Heep. "I am improving my legal knowledge, Master Copperfield," said Uriah, "I am going through Tidd's Practice. Oh what a writer, Mr. Tidd is, Master Copperfield."

Lord Brougham in *Earl of Glasgow v. Hurlet* (1856) 3 H. L. Cas. 25 (at p. 40) spoke of his "learned friend the late Mr. Tidd, the author of one of the very best books in the profession, most logically contrived and arranged . . . the most perfect mode of clear and logical arrangement . . . one of the very few books in which you never look for what you want without finding it." I paid my humble tribute to this excellent book in *Re Erb* (No. 2) (1908) 16 Ont. Law Rep. 597: "a thoroughly reliable compendium of the law as it then stood": p. 599. The only work at all approaching Tidd and that 'longo intervallo,' was Serjeant Sellon's "Practice," London, 1798.

16. Upper Canada obtained similar legislation by the Act 20 Vict. C. 57 (Can.) as to which see *McDowell v. McDowell* (1863) 1 Ch. 140; *McNaughton v. Webster* (1860) 6 U. C. L. J. 17. The present legislation is R. S. O. (1914) C. 80 ss. 12, 18, 19, 20, 25.

17. There was no such writ at the Common Law as a fi. fa. lands. The rather ineffective writ of elegit was given by the Statute of Westminster 2, 13 Edward I C. 18; by this the goods are appraised and (except oxen and beasts of the plough) delivered to the plaintiff at an appraisement in part satisfaction of his debt; also half his land to use until the debt is paid. There was a common law writ of levari facias under which the sheriff seized the goods and received the rents and profits of the lands till the debt was paid. Our fi. fa. lands depends for its origin upon the statute of (1732) 5 George II C. 7, which enacted by sec. 4 "that from and after the . . . 29th Sep-



execution" was out of the question—this was a purely common law debt and the common law courts had no power to appoint a receiver.<sup>18</sup>

What were Dodson and Fogg to do to get the money to which they and their client were lawfully entitled? Only one thing remained, attachment of the person of the debtor—not at all the same thing as attachment to his person.

The judgment being signed the fifth day of Term, a writ of *capias ad satisfaciendum* may issue at once (dated indeed the first day of Term): this is an order to the sheriff to take the debtor and him safely keep so as to have his body before the court at a certain day therein named to make the plaintiff satisfaction for his demand. This is given to the sheriff, who places it in the hands of an officer who arrests the recalcitrant. The sheriff in this case intrusted the enforcement of the writ to Mr. Namby of Bell Alley, Coleman Street, who employed Mr. Smouch to assist. The two officers went to the "George and Vulture," the third morning after the expiration of the first week in Term,<sup>19</sup> and about 9 a. m. arrested Mr. Pickwick. He was taken to Namby's "Sponging House"—for Namby was "officer to the sheriffs of London," and it was usual for sheriffs' officers or bailiffs to keep a "Sponging House" as a preliminary place of imprisonment for arrested debtors; such places were ostensibly intended in ease of the debtor to give him an opportunity of raising money or security for the debt. (The sheriff and his officers were forbidden by the "Lords' Act" of 32 George II to take anyone arrested on bailable process (*capias ad respondendum*) to gaol within twenty-four hours of the arrest.)

The officer made money by his "Sponging House": he furnished, for a consideration, rooms and food with any luxury the person could pay for. The prisoner, however, might fail to satisfy the claim in any way; he then must regularly go to the County Gaol

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tember, 1732, the Houses, Lands, Negroes, and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable" to be sold under execution (negroes were "real estate" like the old English villein). The applicability of this statute to Upper Canada was decided in our first reported case: *Gray v. Willcocks* (January 1806). The King's Bench by a divided court and the Court of Appeals decided against the plaintiff, but this was reversed in Judicial Committee (February 9, 1809). See 49 *Can. Law Journal* (1913) 28, 294.

18. The power to appoint a receiver was given in England by the Judicature Act of 1873 to all branches of the court; in Ontario by the Judicature Act of 1881.

19. The reporter says "Trinity Term," Cap. 12, but see note 10 ante.



in Whitecross Street—or he could go to The Fleet on a writ of habeas corpus.

Perker was sent for, and arrived next morning; his confident suggestion that he or Pickwick should write a cheque for debt and costs was spurned; and Pickwick expressed a wish to go to prison at once. Perker said that he could not go to Whitecross Street: "there are sixty beds in a ward, and the bolt's on sixteen hours out of the four and twenty." Accordingly it was determined that the prisoner should go to the Fleet. It was necessary to have a writ of habeas corpus. Perker and Pickwick, accompanied by Samuel Weller, went off in the afternoon to Serjeants' Inn, Chancery Lane, where a judge of the Common Pleas sat at 4 p. m. for such matters. 'Straw bail' was declined, much to the disappointment and disgust of "the slim and rather lame man in rusty black and a white neck cloth" who had expected to turn an honest two-and-six by per-juring himself in the conventional way—"a legal fiction, my dear sir, nothing more," as Mr. Perker put it. These useful men hung about judges' chambers ready to become bail for a debtor arrested on a *capias ad respondendum* and held to special bail—they "justified," i. e., swore to the ownership of property to the value of any number of pounds required, although everybody, judge included, knew they had not as many ha'pence. This was 'straw bail' by 'men of straw' and it had no place in *capias ad satisfaciendum*.<sup>20</sup>

The clerk in spectacles took the affidavit, the judge signed the habeas corpus, the body of Mr. Pickwick was confided to the tip-staff who conducted him to the warden of the Fleet, and Pickwick was then to be detained until the amount of the judgment and costs in the action of *Bardell v. Pickwick* should be paid.<sup>21</sup>

It was the experience of seeing how incarceration in the Fleet was regularly and normally effected which caused Samuel Weller to insist on a "have-his-carcass" in his own case; for "the have-his-carcass, next to the perpetual motion, is vun of the blessedest things as wos ever made"; and while "visperin's to the Chancellorship" might be all right for getting into prison he thought "it mayn't be altogether safe vith reference to the gettin' out again."

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20. The expression "straw bail" is sometimes derived from the straw which such men had in their shoes to show their vocation, but if such a practice did prevail, it is much more likely that the straw was symbolical of the character of the bail to be offered. At all events "man of straw" was and is a well known expression. Those of Covenanted descent will remember the "Tulchan" Bishops.

21. A very full and practical account of these proceedings will be found in *Sellon "Practice"* Vol. II pp. 264, 265. A slightly different course was followed to obtain entry into the King's Bench.

How Pickwick and his faithful Sam got out is a short story—it is confusedly and in some respects inaccurately reported, but there is no difficulty in reconstructing it. The client, Mrs. Bardell, no doubt, thought that she did not owe Dodson and Fogg, her attorneys, anything for costs; it was in evidence at the trial that they had done the “very generous thing” and had “taken up the case on spec” and were “to charge nothin’ at all for costs unless they get ’em out of Mr. Pickwick.” But the attorneys had to be paid—it is only those who are not and never were attorneys who fail to see the necessity. No doubt, had the matter been tried out—at least if on affidavit—it would be made to appear that their generosity extended only so far as to agree not to charge any costs unless they should succeed—and they had succeeded. However that may be, they made out and rendered their bill of costs<sup>22</sup> “between attorney

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22. Unless Perker was disingenuous or incompetent or has been misreported, this bill of costs must have been at least £300. Perker told Pickwick that the question of Mrs. Bardell remaining in the Fleet “rests solely, wholly, and entirely with you”; that he could “rescue her from this den of wretchedness . . . only . . . by paying the costs of this suit.” By the Act of 1793, 33 George III C. 59, any debtor up to £300 imprisoned could procure his release by surrendering his property to his creditor (unless the creditor insisted on his remaining in custody, in which case the creditor must pay 2s 4d per week; it is not at all likely that Dodson and Fogg would throw good money after bad).

Nor would a bill of £300 be exorbitant. The bill “party and party” was apparently £133, 6, 4; there were many items to be added not taxable “party and party,” the splendid Buzfuz had been well fed, witnesses had been interviewed, information sought in many quarters, etc., etc., and an extra bill “attorney and client” of £166, 13, 8 would not shock the conscience of a hardened Common Law practitioner while a “Chancery man” would scoff at it.

I have no sympathy with the current notion that Serjeant Snubbin was hopelessly outclassed by Buzfuz, great counsel as Buzfuz was. I have carried too many briefs for the defendant not to appreciate Snubbin’s position; he had to sit and watch for holes in the plaintiff’s case, to admit what he knew could be proved thereby diminishing the effect on the jury, to avoid pitfalls, let well enough and ill enough alone. See what happened to his junior, the unhappy Phunky—of course, he was “a very young man . . . only called the other day . . . not been at the bar eight years yet”—after he did not sit down when Serjeant Snubbin winked at him, but continued to cross-examine the too-willing Winkle. It had been determined in advance not to call witnesses for the defense, and it is hard to see what the serjeant could have done that he did not do. ‘Crede experto,’ the lot of defendant’s counsel in such cases is not a happy one.

I venture to add what I have said in another place, concerning Serjeant Buzfuz.

It is incomprehensible to me how barristers at least (whatever may be said of laymen) can look upon Serjeant Buzfuz as a burlesque. His name is no doubt intended as humour—perhaps Serjeant John Bernard Bosanguet, who was made a judge just before the trial of *Bardwell v. Pickwick*, is hinted at as Mr. Justice Gaselee is in Mr. Justice Stareleigh.

But his address, his marshalling of evidence, his examination of witnesses and his general conduct of the case for the plaintiff are just such as was to be expected from an able and experienced counsel; and nothing could be less farcical. Of course, in the public mind, a suit for “breach” is always amus-



and client," issued a writ of *capias* and had the unsuspecting client sign a "*cognovit actionem, relicta verificatione*."<sup>23</sup> This enabled the attorneys to sign judgment when they chose, and they did so in July.

They issued a *capias ad satisfaciendum*, arrested Mrs. Bardell and carried her to the Fleet within a week of the close of the month of July, after *Pickwick* had "for three long months . . . remained shut up all day; only stealing out at night to breathe the air." These excellent and thoughtful men saved Mrs. Bardell all trouble in the way of getting a writ of *habeas corpus*, etc.; everything was prepared for her immediate entry into the Fleet—did not their very efficient clerk, Mr. Jackson, say, "They were anxious to spare your feelings as much as they could"?

Perker told *Pickwick* that the only way for her to get out was by him, *Pickwick*, "paying the costs of the suit . . . to . . . these sharks,"<sup>24</sup> for thus unkindly did he speak of his brother prac-

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ing, and counsel for the defendant plays on that popular idea, but counsel for the plaintiff combats it and never exhibits the slightest levity—he is more than usually stern and ceremonious.

Dickens' report is admirable, and no barrister can fail to appreciate the faithfulness of his description or the skill and acumen of counsel portrayed.

23. Which nobody knows anything about since the Judicature Act, but which was once not very uncommon: I saw more than one, when a student-at-law, 'Consule Planco.' We are told and Mrs. Bardell admits the fact that the attorneys "got a *cognovit* out of her for the amount of 'em right after the trial." It would be irregular to obtain a *cognovit* before the issue of the writ, although one case in 1820 seems to say that under certain circumstances that would be sustained if a writ was subsequently issued: *Wade v. Swift* (1820) 8 Price 513; the better opinion is that a *cognovit* required a writ to support it, but this the writ need not have been served: *Kerbey v. Jenkins* (1832) 2 Tyrwhitt 499; *Shanley v. Colwell* (1840) 6 Meeson & Welsby 543. Perker seems to have suspected some defect in the *cognovit*, but it is not likely that the attorneys did not take care to be perfectly regular.

24. There is some confusion here. The *capias ad satisfaciendum* on which Mrs. Bardell was held was for the amount of the judgment and costs in the action, *Dodson et al. v. Bardell*, not the costs taxed in *Bardell v. Pickwick*. Mrs. Bardell could procure her release only by paying the amount in the action in which she was a defendant. Perker is reported as saying to his client: "You can rescue her . . . only . . . by paying the costs of this suit both of plaintiff and defendant into the hands of these Freeman's court sharks." This is unintelligible; if "this suit" meant *Bardell v. Pickwick*, the "sharks" had nothing to do with the "costs of defendant": Perker was entitled to them after he and his client had "dived into some very complicated accounts and vouchers . . . duly displayed and gone through"; and it is not at all likely that these attorneys or any attorneys, sharks or otherwise, would be satisfied with the amount of costs taxed to the plaintiff. They had their attorney's lien on the judgment, and they could prevent Mrs. Bardell discharging it until their "attorney and client" costs were paid.

Perker could not be speaking of the action *Dodson et al. v. Bardell*. The costs of this action were but a small part of the claim. No doubt what he did say was "the attorney and client costs in this suit," i. e. *Bardell v. Pickwick*.

There is another difficulty: how did Fogg come to speak of the "taxed costs . . . one hundred and thirty-three, six, four" at all? And why should there be "a great comparing of papers and turning over of leaves by



titioners. Perker arranged that Mrs. Bardell should give a release of the judgment of £750 damages, and Pickwick agreed to pay. Upon Perker's sending his undertaking to pay, the magnanimous attorneys sent down a discharge for Pickwick (and of course Mrs. Bardell). As soon as Pickwick agreed to pay, the defendant in *Weller v. Weller* sent to the illustrious Mr. Pell for the formal discharge which the plaintiff, "red-faced Nixon," "unnat'ral waga-bone," "old image," "cruel pa," "unremorseful enemy," "unnat'ral creditor," but "prudent parent" withal, "had had the foresight to leave in the hands of that learned gentleman." The elder Weller would have "nobody but Pell as a legal adviser," the Lord Chancellor, with friendly envy sighing, called him a wonder and he certainly well deserved the little retaining fee of five pounds he afterwards received from the "leg-at-ease"; therefore he was an eminently proper custodian of this important document.

All the three prisoners were thus set free; all lived happy ever after; and Mrs. Bardell "never brought any more actions for breach of promise of marriage"—more's the pity.

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Dodson and Fogg?" The whole thing was perfectly simple, and the amount for which Mrs. Bardell was held in plain words in the *capias*. What is meant by "this statement of profit and loss"? There was no such statement, no need of or use for one. There is no suggestion that the attorneys were compromising their claim, nothing to indicate fear of indictment for conspiracy and, indeed, Mr. Perker had expressed his opinion that they were too clever for that; Perker never even suggests trying to cut down the claim of the "couple of rascals"; and it is inconceivable that they would not get all they were legally entitled to.

Most of the difficulty disappears if we read 'untaxed costs'—this is the reading in the Peterson edition (Philadelphia).

# A LIST OF ONE HUNDRED LEGAL NOVELS<sup>1</sup>

By JOHN H. WIGMORE

1. And what, pray, is a 'legal' novel? For there have surely not been many illegal novels. The illegalities in which the great novelists have figured have commonly been not suits for libels committed by them, but gallant struggles (like those of Charles Reade) to protect their copyrights against pirates, or to vindicate themselves (like poor Cooper) against envenomed reviewers.

A 'legal' novel, as here meant, will be simply a novel in which a lawyer, most of all, ought to be interested, because the principles or the profession of the law form a main part of the author's theme.

As for any definition or further subdividing of the 'legal' novel, it is perhaps unprofitable and certainly difficult, being decidedly open to difference of taste and opinion. Nevertheless, for those who care to pick and choose, there may be noted, in the rough, four kinds:

(A) Novels in which some *trial scene* is described—perhaps including a skilful cross-examination;

(B) Novels in which the *typical traits of a lawyer or judge*, or the *ways of professional life*, are portrayed;

(C) Novels in which the methods of law in the *prosecution and punishment of crime* are delineated; and

(D) Novels in which some *point of law*, affecting the rights or the conduct of the personages, *enters into the plot*.

In the following list these sorts are indicated by the letters A, B, C, D. But let it be understood that such an indication is suggestive only; for the class of a particular novel is often a matter for difference of opinion. Moreover, the list will include only those in which one of these circumstances is a more or less prominent feature.

2. But the list need not try to include *all* such works of fiction—good, bad, or indifferent. Where shall the line be drawn? On the one hand, it must not exclude all but the works of the great masters, from Fielding and Dickens to Stevenson and Howells. Yet it may properly be confined to what may be called literature, i. e.,

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1. This article is a corrected reprint of an article originally appearing in this REVIEW in April, 1908 (vol. II, p. 574). Notice is hereby given that neither this article nor the list of novels which follow may be reprinted in any other periodical without permission of ILLINOIS LAW REVIEW.

## WHY PICKWICK WAS GAOLED

BY WILLIAM RENWICK RIDDELL

A young Toronto barrister the other day raised the question, Why was Pickwick imprisoned? I attempted to answer the question; and it has occurred to me that others may have been puzzled in the same way and may conceivably be glad of the explanation.

The celebrated action of *Bardell v. Pickwick*—probably the best known action in the world—was begun by writ of *capias ad respondendum*, August 28, 1830, the 'original writ' still theoretically the first process having for more than half a century been omitted except where outlawry was intended. Pickwick was not given the chance by the eminent firm of Dodson and Fogg, attorneys<sup>1</sup> of His Majesty's courts of King's Bench and Common Pleas at Westminster and solicitors of the High Court of Chancery, to settle before action; but he received a letter from them when he was at the "Angel," Bury St. Edmunds, asking the name of his attorney in London who would accept service of the writ. That he should at once say that it was "a base conspiracy between these two grasping attorneys" was to be expected—no one likes to be sued and the lawyer is always blamed.

It was not intended actually to arrest the defendant—that could be done only on an affidavit made and filed in an action where the cause of action was originally at least fifteen pounds<sup>2</sup> (except on bills of exchange and promissory notes).

The actual arrest was intended and effected in the well-known case of *Weller v. Weller*. The unfortunate if facetious Samuel Weller in all innocence borrowed twenty-five pounds from his father: that "unnat'ral wagabone" demanded its return, "five minits arterwards"; Samuel refused, said "I von't pay" and cut up rough. Solomon Pell, an attorney whose practice lay in bankruptcy and who, though he had no fixed office, was a particular friend of the Lord Chancellorship's who would "be damned if Pell could not get anybody through the insolvent court," was consulted. Pell had "got brains like the frogs dispersed all over his body and reachin' to the wery tips of his fingers"; he seized the situation at once, "led the

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1. "His Majesty's attorneys of the courts of King's Bench, etc.," as the reporter has it.

2. See the statutes (1811) 51 Geo. III C. 124 s. 1, (1817) 57 Geo. III C. 101.



elder Mr. Weller down to the Temple to swear to the affidavit of debt," which Pell's "boy with the assistance of the blue bag<sup>s</sup> had drawn up on the spot." The "cruel pa" did not relent, the officer arrived and the defendant was without delay arrested and delivered into the custody of the Warden of the Fleet.

Pell's bill of costs must be considered most moderate—he received "three ten and one ten . . . five" for his services in incarcerating this "reg'lar prodigy son"—when one remembers another celebrated attorney, Mr. Quirk of Quirk, Gammon and Snap, who had "never been seen to shed a tear but once—when five-sixths of his little bill of costs, £196, 15s, 4d, was taxed off in an action on a bill of exchange for £13,"<sup>4</sup> or indeed Mr. Fogg himself, who in the action of *Bullman v. Ramsey* for £2, 10 made up a bill of £3, 5 even before declaration filed—of course it must be remembered that Fogg was essentially benevolent, for, "with a sweet smile on his face," he said (after refusing the amount as not enough): "It's a Christian act to do it . . . for with his large family and small income he'll be all the better for a good lesson against getting into debt"; and he "smiled so good naturedly as he went away that it was delightful to see him."

Samuel was wholly justified in insisting that there was to be "no vispering's to the Chancellorship, none o' them unconstitootional ways of doing it," and everything was quite regular; he could assure Pickwick that he was "a pris'ner . . . arrested this here very arternoon for debt" at the instance of a man that "ull never let me out, till you go yourself."

But nothing of the kind occurred or was contemplated in Pickwick's case; he had to be served with a writ, unless an attorney accepted service and undertook to appear. Pickwick did not answer the letter of Dodson and Fogg of August 28, 1830, but came up to London, Thursday, September 2nd; and next day he called upon the attorneys at Freeman's Court, Cornhill; as he offered no terms, he was served with a copy of the writ, the original being shown him at the same time.

He used language much to be reprobated—actionable, indeed—toward and of these eminent practitioners; and he might well have got himself into an "action on the case for defamation." He left

3. In this Province, attorneys, solicitors and their clerks were allowed to carry only black bags; barristers (not K. C.'s), blue; K. C.'s, red; and judges, green bags.

4. Samuel Warren "Ten Thousand A-Year" cap. vi.

saying, "You shall hear from my solicitor,"<sup>5</sup> and went to see Mr. Perker of Gray's Inn. He being away from town for a week, Pickwick saw Mr. Lowten, his clerk, and left the copy of the writ with him with instructions to defend.

No Special Bail being required, a "common appearance" was entered with merely nominal sureties, "John Den and Richard Fen"; then followed declaration by plaintiff, plea by defendant and replication by plaintiff, issue.<sup>6</sup>

The case was set for trial at Guildhall by a Special Jury—nothing so common as a common jury for Dodson and Fogg and their eminent Counsel, Serjeant Buzfuz—"in the settens after Term," February 14, 1831; and Pickwick's friends, Snodgrass, Tupman, and Winkle with his servant, Samuel Weller, were subpoenaed on behalf of the plaintiff in the early part of January. Weller next morning sagely observed that the day set for the trial was a "remarkable coincidence . . . Valentine's day . . . reg'lar good day for a breach o' promise trial."

The judge was Mr. Justice Stareleigh,<sup>7</sup> "a most particularly short man and so fat that he seemed all face and waist-coat": Counsel for the plaintiff, Serjeant Buzfuz<sup>8</sup> and Mr. Skimpin; for the defendant, Serjeant Snubbin and Mr. Phunky.

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5. Someone's mistake—Mr. Pickwick's or the reporter's. "Solicitors" did not practise in the common law courts; their court was chancery. Attorneys practised in the common law courts; generally an attorney was a solicitor and vice versa. Dickens speaks of Perker again as Pickwick's solicitor in the interview with Mr. Serjeant Snubbin; also after the trial.

6. When our court of King's Bench was established in 1794 by the Act of 34 George III C. 2 (U. C.) with the jurisdiction of the courts at Westminster, it was provided by sec. 5 that "the original and first process . . . shall be by writ of *capias ad respondendum*," and that no one was to be held to special bail or arrested unless on an affidavit of debt in a sum certain and setting out that the defendant was about to leave the Province with intent to defraud his creditors: Sec. 6. The formality of "original writ" was not provided for and never was in use in Upper Canada even when outlawry was desired.

7. Of course, Mr. Justice Sir Stephen Gaselee, appointed to the court of Common Pleas 1824, resigned in 1837 and died 1839, aged 77, "a painstaking and upright judge and in his private capacity . . . a worthy and benevolent man."

8. The serjeants-at-law still had the valuable monopoly of counsel practice in term time in the court of Common Pleas; but this was not in term but a trial court of *nisi prius*. The special privilege, Campbell, when Attorney General, attempted to abolish by royal warrant in 1834; it was obeyed for a time, but on argument was held to be ineffective: 10 Bing. 571, 572; 6 Bing. (N. C.) 235-239. During the delivery of the judgment "a furious tempest of wind prevailed which seemed to shake the fabric of Westminster Hall and nearly burst open the windows and doors of the court of Common Pleas." The privilege was abolished in 1846 by the Act 9, 10 Vict. C. 54. The judges addressed serjeants as "brother" as by custom until 1873, everyone before being made a judge was made a serjeant.



The special jury not all turning up, a sensitive greengrocer and a philosophical if pessimistic chemist were sworn in as talesmen.

There is no need to say anything of the trial; neither of the parties did or could give evidence. It is true that in an occasional local court in England and in certain inferior courts in Upper Canada (from 1792) the evidence of plaintiff and defendant was allowed; but it was not till 1851 that the superior courts were allowed to permit parties to give evidence.<sup>9</sup>

A verdict went for the plaintiff for £750; the elder Weller "know'd what 'ud come of this here mode o' doin' business," and lamented, "Vy worn't there a alleybi?"

Pickwick vehemently asserts to Dodson and Fogg, "Not one farthing of costs or damages do you ever get from me, if I spend the rest of my existence in a debtor's prison," and is told that he will think better of it before next term.

Two months must elapse before the judgment could be entered up for the amount of damages and costs—final judgments could be entered up only on the *postea*, i. e., the entry of the verdict of the jury which was endorsed on the back of the record at *nisi prius*. In the common pleas, where the action was tried in London as this was, an officer of the court, "the associate," kept the record with the *postea* endorsed on it in his own custody until the fifth day of the following term. This was to allow the losing party to move in term against the verdict for a new trial, etc., etc.

But the inevitable fifth day of Trinity term<sup>10</sup> arrived; Dodson and Fogg received the record and entered up judgment on the *postea* for £750 damages and costs taxed at £133, 6, 4, as Mr. Fogg said some time later when with considerable native humour he was for

9. Our act giving the Courts of Requests with jurisdiction in debt up to 40 shillings Quebec currency (36 shillings sterling) the right to administer an oath to the plaintiff or defendant is (1792) 32 George III C. 6 (U. C.), and is the first statute of which I have any knowledge in any English speaking country giving that power. The English legislation is (1846) 9, 10 Vict. C. 95, for certain courts (1851) 14, 15, Vict. C. 99, the general Act, and (1869) 32, 33 Vict. C. 68. See my judgment in *Boyle v. Rothschild* (1908) 16 Ont. Law Rep. 424.

10. The terms for 1831 were regulated by the act (1830) 1 Will. IV C. 70 s. 6. Hilary Term began January 11, ended January 31. Easter Term began April 15, ended May 8. Trinity Term began May 22, ended June 12. Michaelmas Term began November 2, ended November 25.

Dickens is therefore astray in his terminology and dates. The trial being held February 14, the *postea* would be delivered to the plaintiff and judgment entered on the fifth day of Easter Term, not in Trinity Term at all. The Original Terms were: Hilary, January 23 to February 12. Easter, Wednesday after Easter Day to Monday three weeks after. Trinity, Friday after Trinity Sunday to Wednesday fortnight. Michaelmas, November 6 to November 28.



making "Mr. Pickwick pay for peeping." And now Mr. Pickwick must pay up or stand the consequences.

My young Toronto friend found his difficulty just here—he truly said the attorneys (he from habit called them "solicitors," as we have had no attorneys-at-law since 1881) had no ill-will towards Pickwick, they did not wish to punish him, all they wanted was their money. That they had no feeling against Pickwick is certain; Dodson, "a plump, portly, stern-looking man with a loud voice," and Fogg, the man of business, "an elderly, pimply-faced, vegetable-diet kind of a man," both on their first interview with Pickwick had "an air of offended virtue" and looked upon his conduct towards their client, Mrs. Bardell, with grave disfavour—they rather welcomed his most slanderous epithets, and did not bring an action of libel against him. After the trial they jested with him; Dodson laughed and Fogg grinned, when Pickwick was speechless with indignation; and when Pickwick became willing to pay up, they were more than glad to let him have his freedom: Nay, they saluted him cordially, solicitously asked as to his health, expressed great happiness on making his acquaintance and great concern on hearing that he had been "persecuted and annoyed by scoundrels of late." Dodson expressly said that he bore no ill-will or vindictive feeling toward Pickwick; and Fogg warmly concurred in a most forgiving manner—all this courtesy, good nature and charity while the payer was flashing forth looks of fierce indignation, restraining his wrath by gigantic efforts, with the blood tingling in his cheeks, refusing to give his hand, charging the attorneys with insolent familiarity and ending up with calling them "a well-matched pair of mean, rascally, pettifogging robbers." They were even willing to let Pickwick assault them—or at least each was willing to let Pickwick assault the other—without returning it.

Men of that forgiving Christian temperament—for it is not necessary to recall Fogg's Christian act toward the rash debtor, Ramsey, to enable one to recognize the character of these men—men of their temperament could have no ill-will toward anyone and it *was* only their money they wanted.

As the defendant was a man of means, there would nowadays be no difficulty in making the money. If he did not pay up he would be examined as a judgment debtor,<sup>11</sup> the property or means he had for satisfying the judgment would be disclosed, the debts due him, the money he had in banks—he was forever signing cheques—found

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11. Ontario Rule 580; English Rule 610; in Ontario without, in England with, an order of the court or judge.

out. Then would follow seizure of stock in companies, attachment of debts, etc. All that was far in the future.

There was no way of finding out what property or means this debtor had. The "Lords' Act" (1758) 32 George II, c. 28, had provided that the creditors of a judgment debtor charged in execution for a debt under £100 might compel the debtor on pain of transportation for seven years to make a discovery and surrender of his effects for their benefit and then obtain his release; and legislation in 1793 extended these regulations to debts of £300; but the judgment in *Bardell v. Pickwick* was for £750, and these Acts did not apply.<sup>12</sup>

The common law "coeval with civilized society itself . . . formed from time to time by the wisdom of man"<sup>13</sup> thought to be the perfection of human reason, even if Blackstone did not say so, never so much as thought of anything so simple and sensible for the discovery of assets: it was not until 1854 that such a practice was provided for. The Common Law Procedure Act of 1852, 15, 16 Vict., c. 76, more than deserved its title, "An Act to Amend the Process, Practice and Mode of Pleading in the Superior Courts of Common Law at Westminster . . .," it was revolutionary, rather than amending, but it was not sufficiently revolutionary to give such relief to a creditor. But Parliament had got going and The Common Law Procedure Act of 1854, 17, 18 Vict. c. 125, by section 60, provided for an examination of a judgment debtor in almost the same language as the present English Rule 610.<sup>14</sup>

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12. The "Lords' Act" was so called because it originated in the Upper House. It was rather intended for the relief of debtors in prison; the Act of (1786) 26 George III C. 44, enlarged the provisions to debts of £200; that of (1793) 33 George III C. 5, s. 3, made perpetual by (1799) 39 George III C. 50, to those of £300.

Of course, a bank account is in law nothing but a debt owed by the bank to the depositor; once money is deposited, the money itself is the money of the bank, and a debt is established from bank to depositor: *Foley v. Hill* (1848) 2 H. L. Cas. 28.

13. Lord Kenyon in *Rex. v. Busby* (1801) Peake 193.

14. Upper Canada did not lag behind. "The Common Law Procedure Act" (1856) 19 Vict. C. 43 (Can.) followed closely the English Acts of 1852 and 1854; then followed the amending Act of 1857, 20 Vict. C. 57 (Can.), consolidated in 1859, C. S. U. C. C. 22.

There were subsequent English Acts, e. g. (1860) 23, 24 Vict. C. 126 (Imp.), and Canadian Acts; but I do not pursue the inquiry further.

The practice in Upper Canada (now Ontario) under these acts is fully, minutely, and accurately described in *Harrison* "Common Law Procedure Act" Toronto, 1858, by Robert A. Harrison, afterwards Chief Justice of Upper Canada, whose judgments always "collected all the authorities." In England, perhaps *Finlason* "Common Law Procedure Act" (eds. 1855 and 1860) gives as good an account as any; *Quain and Holroyd* (1852) does not cover the Act of 1854; *Markham* "Common Law Procedure Acts" (3rd ed. London 1864) is a useful manual.



Even if there had been any way of finding out Pickwick's assets, there was no way of making them available to pay the judgment—there was no such thing as attachment of debts at the common law—that also came into existence in England by The Common Law Procedure Act of 1854, closely followed in this as in other respects by the Canadian Act of 1856.

Nor could debts be seized under a writ of execution against goods—a writ of fieri facias (or Fi. Fa., as it is generally called). This was a common law writ directed to the sheriff to cause to be made of the goods and chattels of the debtor the amount of the judgment and costs. The delightful pages of Tidd's Practice—"Oh, what a writer Mr. Tidd is!"<sup>15</sup>—will tell us what could be seized under a fi. fa. at that time. No money (except money in the possession of the defendant), no bank notes, nothing but goods and corporeal chattels capable of sale. It was not until 1838 that the law was changed: in that year by the Statute 1, 2 Vict., c. 110, s. 12 (Imp.), the sheriff was enabled to seize under a fi. fa., money, bank notes, promissory notes, and other securities for money, and sue on the securities: in 1840 by the Statute, 3, 4 Vict., c. 82, stock or shares in companies could be charged with the payment of the debt—but an ordinary debt from a third person could not be reached in that way.<sup>16</sup>

Pickwick had apparently no land and so the writ of Elegit, or that of Levari Facias was of no avail<sup>17</sup> in his case. "Equitable

15. Teste Uriah Heep. "I am improving my legal knowledge, Master Copperfield," said Uriah, "I am going through Tidd's Practice. Oh what a writer, Mr. Tidd is, Master Copperfield."

Lord Brougham in *Earl of Glasgow v. Hurlet* (1856) 3 H. L. Cas. 25 (at p. 40) spoke of his "learned friend the late Mr. Tidd, the author of one of the very best books in the profession, most logically contrived and arranged . . . the most perfect mode of clear and logical arrangement . . . one of the very few books in which you never look for what you want without finding it." I paid my humble tribute to this excellent book in *Re Erb* (No. 2) (1908) 16 Ont. Law Rep. 597: "a thoroughly reliable compendium of the law as it then stood": p. 599. The only work at all approaching Tidd and that 'longo intervallo,' was Serjeant Sellon's "Practice," London, 1798.

16. Upper Canada obtained similar legislation by the Act 20 Vict. C. 57 (Can.) as to which see *McDowell v. McDowell* (1863) 1 Ch. 140; *McNaughton v. Webster* (1860) 6 U. C. L. J. 17. The present legislation is R. S. O. (1914) C. 80 ss. 12, 18, 19, 20, 25.

17. There was no such writ at the Common Law as a fi. fa. lands. The rather ineffective writ of elegit was given by the Statute of Westminster 2, 13 Edward I C. 18; by this the goods are appraised and (except oxen and beasts of the plough) delivered to the plaintiff at an appraisement in part satisfaction of his debt; also half his land to use until the debt is paid. There was a common law writ of levari facias under which the sheriff seized the goods and received the rents and profits of the lands till the debt was paid. Our fi. fa. lands depends for its origin upon the statute of (1732) 5 George II C. 7, which enacted by sec. 4 "that from and after the . . . 29th Sep-



execution" was out of the question—this was a purely common law debt and the common law courts had no power to appoint a receiver.<sup>18</sup>

What were Dodson and Fogg to do to get the money to which they and their client were lawfully entitled? Only one thing remained, attachment of the person of the debtor—not at all the same thing as attachment to his person.

The judgment being signed the fifth day of Term, a writ of *capias ad satisfaciendum* may issue at once (dated indeed the first day of Term): this is an order to the sheriff to take the debtor and him safely keep so as to have his body before the court at a certain day therein named to make the plaintiff satisfaction for his demand. This is given to the sheriff, who places it in the hands of an officer who arrests the recalcitrant. The sheriff in this case intrusted the enforcement of the writ to Mr. Namby of Bell Alley, Coleman Street, who employed Mr. Smouch to assist. The two officers went to the "George and Vulture," the third morning after the expiration of the first week in Term,<sup>19</sup> and about 9 a. m. arrested Mr. Pickwick. He was taken to Namby's "Sponging House"—for Namby was "officer to the sheriffs of London," and it was usual for sheriffs' officers or bailiffs to keep a "Sponging House" as a preliminary place of imprisonment for arrested debtors; such places were ostensibly intended in ease of the debtor to give him an opportunity of raising money or security for the debt. (The sheriff and his officers were forbidden by the "Lords' Act" of 32 George II to take anyone arrested on bailable process (*capias ad respondendum*) to gaol within twenty-four hours of the arrest.)

The officer made money by his "Sponging House": he furnished, for a consideration, rooms and food with any luxury the person could pay for. The prisoner, however, might fail to satisfy the claim in any way; he then must regularly go to the County Gaol

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tember, 1732, the Houses, Lands, Negroes, and other Hereditaments and real Estates situate or being within any of the said (British) Plantations (in America) shall be liable" to be sold under execution (negroes were "real estate" like the old English villein). The applicability of this statute to Upper Canada was decided in our first reported case: *Gray v. Willcocks* (January 1806). The King's Bench by a divided court and the Court of Appeals decided against the plaintiff, but this was reversed in Judicial Committee (February 9, 1809). See 49 *Can. Law Journal* (1913) 28, 294.

18. The power to appoint a receiver was given in England by the Judicature Act of 1873 to all branches of the court; in Ontario by the Judicature Act of 1881.

19. The reporter says "Trinity Term," Cap. 12, but see note 10 ante.

in Whitecross Street—or he could go to The Fleet on a writ of habeas corpus.

Perker was sent for, and arrived next morning; his confident suggestion that he or Pickwick should write a cheque for debt and costs was spurned; and Pickwick expressed a wish to go to prison at once. Perker said that he could not go to Whitecross Street: "there are sixty beds in a ward, and the bolt's on sixteen hours out of the four and twenty." Accordingly it was determined that the prisoner should go to the Fleet. It was necessary to have a writ of habeas corpus. Perker and Pickwick, accompanied by Samuel Weller, went off in the afternoon to Serjeants' Inn, Chancery Lane, where a judge of the Common Pleas sat at 4 p. m. for such matters. 'Straw bail' was declined, much to the disappointment and disgust of "the slim and rather lame man in rusty black and a white neck cloth" who had expected to turn an honest two-and-six by per-juring himself in the conventional way—"a legal fiction, my dear sir, nothing more," as Mr. Perker put it. These useful men hung about judges' chambers ready to become bail for a debtor arrested on a *capias ad respondendum* and held to special bail—they "justified," i. e., swore to the ownership of property to the value of any number of pounds required, although everybody, judge included, knew they had not as many ha'pence. This was 'straw bail' by 'men of straw' and it had no place in *capias ad satisfaciendum*.<sup>20</sup>

The clerk in spectacles took the affidavit, the judge signed the habeas corpus, the body of Mr. Pickwick was confided to the tip-staff who conducted him to the warden of the Fleet, and Pickwick was then to be detained until the amount of the judgment and costs in the action of *Bardell v. Pickwick* should be paid.<sup>21</sup>

It was the experience of seeing how incarceration in the Fleet was regularly and normally effected which caused Samuel Weller to insist on a "have-his-carcass" in his own case; for "the have-his-carcass, next to the perpetual motion, is vun of the blessedest things as wos ever made"; and while "visperin's to the Chancellorship" might be all right for getting into prison he thought "it mayn't be altogether safe vith reference to the gettin' out again."

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20. The expression "straw bail" is sometimes derived from the straw which such men had in their shoes to show their vocation, but if such a practice did prevail, it is much more likely that the straw was symbolical of the character of the bail to be offered. At all events "man of straw" was and is a well known expression. Those of Covenanted descent will remember the "Tulchan" Bishops.

21. A very full and practical account of these proceedings will be found in *Sellon* "Practice" Vol. II pp. 264, 265. A slightly different course was followed to obtain entry into the King's Bench.



How Pickwick and his faithful Sam got out is a short story—it is confusedly and in some respects inaccurately reported, but there is no difficulty in reconstructing it. The client, Mrs. Bardell, no doubt, thought that she did not owe Dodson and Fogg, her attorneys, anything for costs; it was in evidence at the trial that they had done the “very generous thing” and had “taken up the case on spec” and were “to charge nothin’ at all for costs unless they get ‘em out of Mr. Pickwick.” But the attorneys had to be paid—it is only those who are not and never were attorneys who fail to see the necessity. No doubt, had the matter been tried out—at least if on affidavit—it would be made to appear that their generosity extended only so far as to agree not to charge any costs unless they should succeed—and they had succeeded. However that may be, they made out and rendered their bill of costs<sup>22</sup> “between attorney

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22. Unless Perker was disingenuous or incompetent or has been misreported, this bill of costs must have been at least £300. Perker told Pickwick that the question of Mrs. Bardell remaining in the Fleet “rests solely, wholly, and entirely with you”; that he could “rescue her from this den of wretchedness . . . only . . . by paying the costs of this suit.” By the Act of 1793, 33 George III C. 59, any debtor up to £300 imprisoned could procure his release by surrendering his property to his creditor (unless the creditor insisted on his remaining in custody, in which case the creditor must pay 2s 4d per week; it is not at all likely that Dodson and Fogg would throw good money after bad).

Nor would a bill of £300 be exorbitant. The bill “party and party” was apparently £133, 6, 4; there were many items to be added not taxable “party and party,” the splendid Buzfuz had been well fed, witnesses had been interviewed, information sought in many quarters, etc., etc., and an extra bill “attorney and client” of £166, 13, 8 would not shock the conscience of a hardened Common Law practitioner while a “Chancery man” would scoff at it.

I have no sympathy with the current notion that Serjeant Snubbin was hopelessly outclassed by Buzfuz, great counsel as Buzfuz was. I have carried too many briefs for the defendant not to appreciate Snubbin’s position; he had to sit and watch for holes in the plaintiff’s case, to admit what he knew could be proved thereby diminishing the effect on the jury, to avoid pitfalls, let well enough and ill enough alone. See what happened to his junior, the unhappy Phunky—of course, he was “a very young man . . . only called the other day . . . not been at the bar eight years yet”—after he did not sit down when Serjeant Snubbin winked at him, but continued to cross-examine the too-willing Winkle. It had been determined in advance not to call witnesses for the defense, and it is hard to see what the serjeant could have done that he did not do. ‘Crede experto,’ the lot of defendant’s counsel in such cases is not a happy one.

I venture to add what I have said in another place, concerning Serjeant Buzfuz.

It is incomprehensible to me how barristers at least (whatever may be said of laymen) can look upon Serjeant Buzfuz as a burlesque. His name is no doubt intended as humour—perhaps Serjeant John Bernard Bosanguet, who was made a judge just before the trial of *Bardwell v. Pickwick*, is hinted at as Mr. Justice Gaselee is in Mr. Justice Stareleigh.

But his address, his marshalling of evidence, his examination of witnesses and his general conduct of the case for the plaintiff are just such as was to be expected from an able and experienced counsel: and nothing could be less farcical. Of course, in the public mind, a suit for “breach” is always amus-



and client," issued a writ of *capias* and had the unsuspecting client sign a "cognovit actionem, relicta verificatione."<sup>23</sup> This enabled the attorneys to sign judgment when they chose, and they did so in July.

They issued a *capias ad satisfaciendum*, arrested Mrs. Bardell and carried her to the Fleet within a week of the close of the month of July, after Pickwick had "for three long months . . . remained shut up all day; only stealing out at night to breathe the air." These excellent and thoughtful men saved Mrs. Bardell all trouble in the way of getting a writ of *habeas corpus*, etc.; everything was prepared for her immediate entry into the Fleet—did not their very efficient clerk, Mr. Jackson, say, "They were anxious to spare your feelings as much as they could"?

Perker told Pickwick that the only way for her to get out was by him, Pickwick, "paying the costs of the suit . . . to . . . these sharks,"<sup>24</sup> for thus unkindly did he speak of his brother prac-

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ing, and counsel for the defendant plays on that popular idea, but counsel for the plaintiff combats it and never exhibits the slightest levity—he is more than usually stern and ceremonious.

Dickens' report is admirable, and no barrister can fail to appreciate the faithfulness of his description or the skill and acumen of counsel portrayed.

23. Which nobody knows anything about since the Judicature Act, but which was once not very uncommon: I saw more than one, when a student-at-law, 'Consule Planco.' We are told and Mrs. Bardell admits the fact that the attorneys "got a cognovit out of her for the amount of 'em right after the trial." It would be irregular to obtain a cognovit before the issue of the writ, although one case in 1820 seems to say that under certain circumstances that would be sustained if a writ was subsequently issued: *Wade v. Swift* (1820) 8 Price 513; the better opinion is that a cognovit required a writ to support it, but this the writ need not have been served: *Kerbey v. Jenkins* (1832) 2 Tyrwhitt 499; *Shanley v. Colwell* (1840) 6 Meeson & Welsby 543. Perker seems to have suspected some defect in the cognovit, but it is not likely that the attorneys did not take care to be perfectly regular.

24. There is some confusion here. The *capias ad satisfaciendum* on which Mrs. Bardell was held was for the amount of the judgment and costs in the action, *Dodson et al. v. Bardell*, not the costs taxed in *Bardell v. Pickwick*. Mrs. Bardell could procure her release only by paying the amount in the action in which she was a defendant. Perker is reported as saying to his client: "You can rescue her . . . only . . . by paying the costs of this suit both of plaintiff and defendant into the hands of these Freemon's court sharks." This is unintelligible; if "this suit" meant *Bardell v. Pickwick*, the "sharks" had nothing to do with the "costs of defendant": Perker was entitled to them after he and his client had "dived into some very complicated accounts and vouchers . . . duly displayed and gone through"; and it is not at all likely that these attorneys or any attorneys, sharks or otherwise, would be satisfied with the amount of costs taxed to the plaintiff. They had their attorney's lien on the judgment, and they could prevent Mrs. Bardell discharging it until their "attorney and client" costs were paid.

Perker could not be speaking of the action *Dodson et al. v. Bardell*. The costs of this action were but a small part of the claim. No doubt what he did say was "the attorney and client costs in this suit," i. e. *Bardell v. Pickwick*.

There is another difficulty: how did Fogg come to speak of the "taxed costs . . . one hundred and thirty-three, six, four" at all? And why should there be "a great comparing of papers and turning over of leaves by

tioners. Perker arranged that Mrs. Bardell should give a release of the judgment of £750 damages, and Pickwick agreed to pay. Upon Perker's sending his undertaking to pay, the magnanimous attorneys sent down a discharge for Pickwick (and of course Mrs. Bardell). As soon as Pickwick agreed to pay, the defendant in *Weller v. Weller* sent to the illustrious Mr. Pell for the formal discharge which the plaintiff, "red-faced Nixon," "unnat'ral waga-bone," "old image," "cruel pa," "unremorseful enemy," "unnat'ral creditor," but "prudent parent" withal, "had had the foresight to leave in the hands of that learned gentleman." The elder Weller would have "nobody but Pell as a legal adviser," the Lord Chancellor, with friendly envy sighing, called him a wonder and he certainly well deserved the little retaining fee of five pounds he afterwards received from the "leg-at-ease"; therefore he was an eminently proper custodian of this important document.

All the three prisoners were thus set free; all lived happy ever after; and Mrs. Bardell "never brought any more actions for breach of promise of marriage"—more's the pity.

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Dodson and Fogg?" The whole thing was perfectly simple, and the amount for which Mrs. Bardell was held in plain words in the *capias*. What is meant by "this statement of profit and loss"? There was no such statement, no need of or use for one. There is no suggestion that the attorneys were compromising their claim, nothing to indicate fear of indictment for conspiracy and, indeed, Mr. Perker had expressed his opinion that they were too clever for that; Perker never even suggests trying to cut down the claim of the "couple of rascals"; and it is inconceivable that they would not get all they were legally entitled to.

Most of the difficulty disappears if we read 'untaxed costs'—this is the reading in the Peterson edition (Philadelphia).

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# NEW TRIAL IN PRESENT PRACTICE

WILLIAM RENWICK RIDDELL

Supreme Court of Ontario

In the former article,<sup>1</sup> we discussed the practice in new trials at the common law in England, and pointed out that the trial courts were inferior courts whose judges derived their authority from royal commissions and that they had no power to grant a new trial.

In the present article it is proposed to discuss the practice in new trials as it at present exists on both sides of the Atlantic in the English-speaking world which bases its jurisprudence on the English common law.<sup>2</sup>

## IN ENGLAND—CIVIL CASES

The greatest change in English courts was effected by The Supreme Court of Judicature Act of 1873.<sup>3</sup> This far-reaching act united and consolidated all the superior courts of England into "one Supreme Court of Judicature in England" (sec. 3). This supreme court was to consist of two permanent divisions, one of which, "Her Majesty's High Court of Justice," was to have original jurisdiction with certain appellate jurisdiction from inferior courts; the other, "Her Majesty's Court of Appeal," appellate jurisdiction with certain original jurisdiction (sec. 4). The High Court was vested (*inter alia*) with all the jurisdiction which was or could be exercised by "the courts created by Commissions of Assize,<sup>4</sup> of Oyer and Terminer and of Gaol Delivery, or any of such commissions" (sec. 16 [eleven]).

But this did not abolish the Court of Commissioners. Commissions still continue to be issued (sec. 29), and the only change that was

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<sup>1</sup> *New Trial at the Common Law* (November, 1916) 26 YALE LAW JOURNAL 49.

<sup>2</sup> This will exclude from consideration Quebec and Louisiana, etc., as well as Scotland and some of the small British Isles.

<sup>3</sup> 36 & 37 Vic. Ch. 66. Sec. 2 of this act providing that (with a few exceptions) the act should come into operation on November 2d, 1874, was repealed by the act of 1874, 37 & 38 Vic. Ch. 83, which by sec. 2 directed that the act of 1873 should come into force on November 1st, 1875.

<sup>4</sup> We have seen (26 YALE LAW JOURNAL 49, 51) that at the common law, the commissioners usually had five commissions: 1. Assize. 2. Nisi Prius. 3. Oyer and Terminer. 4. General Gaol Delivery, and 5. The Peace. The commission of Assize was directed to the judges and the clerk of assize to take assizes and do right upon writs of assize brought before them by such as were wrongfully thrust out of their possessions; these writs and the original and substituted practice on them are explained in 3 *Bl. Comm.* 184 *et seq.* When ejectment took the place of these writs, reducing such actions to trial at Nisi Prius, the commission of Assize became obsolete and the only civil commission issued was (properly speaking) that of Nisi Prius; nevertheless the term "Assizes" was retained and the commission was called a "commission of Assize."



made was by making the Court of Commissioners part of the High Court; *certiorari* did not lie to it, but when it was desired to bring up a record in a criminal case, an order was made to bring the record from one part of the High Court, the Court of the Commissioners, to another, *e. g.*, the Queen's Bench Division.<sup>5</sup> No additional powers were given to the trial judge;<sup>6</sup> applications for a new trial must still be made to the "court above." Of the five divisions into which the High Court was divided, three were common-law divisions: the Queen's Bench, the Common Pleas and the Exchequer Divisions—in all cases in any of these divisions, whether the case was tried with or without a jury, an application for a new trial was made to the divisional court "in term" for an order to show cause why a new trial should not be directed, quite the same as the rule *nisi* in the former practice;<sup>7</sup> an appeal lay to the Court of Appeal. In 1876 a rule of court directed the application to be made to the Court of Appeal if the case was tried without a jury.

When the common-law divisions were consolidated into one, the Queen's Bench Division, in 1880,<sup>8</sup> the new rules substituted a simple notice of motion for an order *nisi* and changed the form in some instances—where the trial was by a judge without a jury, the application must be by appeal to the Court of Appeal, where with a jury in the Probate, Divorce and Admiralty Division to a divisional court of that division and in every other case to a divisional court of the Queen's Bench Division.<sup>9</sup> Moreover, it was expressly provided that "no judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself."<sup>10</sup> The Act of 1890<sup>11</sup> directs that all motions for a new trial are to be made to the Court of Appeal "in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury." The effect of this enactment is to eliminate the divisional court;<sup>12</sup>

<sup>5</sup> See, *per* Lord Coleridge, C. J., in *Queen v. Dudley and Stephens* (1884) L. R. 14 Q. B. D. 273, 280.

<sup>6</sup> We shall see that from 1883, the right of a trial judge to take part in the hearing of an application for a new trial in a case tried before him was taken away.

<sup>7</sup> In the Chancery Division, whose judges had not a *Nisi Prius* commission, the application for a "rehearing" was to the judge: the judge before whom the action was pending could order a new trial of an issue directed by himself. In the Probate, Divorce and Admiralty Division, the application was to the judge who tried the case.

<sup>8</sup> By Order in Council, December 16th, 1880, authorized by the Act of 1873, sec. 32; this may be seen in Wilson, *Judicature Acts* (5th ed. London, 1886) 45-48.

<sup>9</sup> Rules of 1883. Order XXXIX, r. 1 (R. 551).

<sup>10</sup> *Idem*. Order XXXIX, r. 2 (R. 552).

<sup>11</sup> Supreme Court of Judicature Act of 1890, 53 & 54 Vic. Ch. 44, sec. 1.

<sup>12</sup> The language of Lord Justice Kay in *Allcock v. Hall* (C. A.) [1891] 1 Q. B. 444, 449. The present rule governing applications for new trials is Order



applications in cases tried without a jury still go to the Court of Appeal.

#### IN ENGLAND—CRIMINAL CASES

We have seen that at the common law there was no power in any court to grant a new trial in cases of felony, and that while power was considered to exist in the Court of King's Bench to grant a new trial in cases of misdemeanor, the power was sparingly exercised,—never when there was an acquittal except in certain *quasi-civil* cases, *e. g.*, in *Quo Warranto*.<sup>13</sup> In the previous article, no account was taken of the *venire facias de novo juratores*, which was not technically an order for a new trial, but which had substantially the same effect—this was awarded by the court (not the trial judge) where a jury was discharged without verdict, where a special verdict was insufficient and in a court of error in cases of mistrial or imperfect verdict.

None of these powers was affected in any way by the various judicature acts, but in 1907 a very great change was effected by the Criminal Appeal Act of 1907.<sup>14</sup> This act abolished writs of errors and all the jurisdiction and practice of the King's Bench Division (which had, under the judicature acts, succeeded to the position of the former Court of King's Bench) as to the grant of new trials in criminal cases, and substituted an appeal against a conviction to a Court of Criminal Appeal on questions of law or (by leave) on questions of fact, or of mixed law and fact, or as to the legality or propriety of the sentence imposed. But no power was given to grant a new trial; and however regrettable the result—an appeal succeeding even on the ground of misdirection to the jury—the conviction is quashed and the accused goes free.<sup>15</sup>

In the British Colonies the course of amendment has been not dissimilar to that of England—I trace that in Ontario (Upper Canada) only.

XXXIX, r. 1 (R. S. C. August, 1913)—all applications must be made to the Court of Appeal whether the case is tried with or without a jury.

<sup>13</sup> 26 YALE LAW JOURNAL 49, 58.

<sup>14</sup> (1907) 7 Edw. VII, Ch. 23.

<sup>15</sup> In *Rex v. Dyson* (Ct. Cr. App.) [1908] 2 K. B. 454, 458, Lord Alverstone, C. J., said:

"It is to be regretted the Legislature when passing the Criminal Appeal Act did not empower the Court to order a new trial, for the present is a case in which it is eminently desirable that such a power should exist. But they did not think fit to do so, and we have no choice but to allow the appeal."

This was a case of misdirection as was the later case of *Rex v. Ahlers* (1914) 24 Cox. C. C. 623, where a German-born British subject escaped the punishment of high treason.

I have not said anything of the practice under The Crown Cases Act of 1848, 11 & 12 Vic. Ch. 78, still in force in Ireland, never in force in Scotland, and repealed as to England by the Criminal Appeal Act of 1907. That act authorized

## IN UPPER CANADA (ONTARIO)—CIVIL CASES

Upper Canada in 1792 began its provincial career with its immense territory divided into four districts. In each of these districts there was a Court of Common Pleas with full civil but no criminal jurisdiction. This condition lasted but a short time; but while it lasted, applications for a new trial were made to the judges of the Court of Common Pleas of the district. These judges presided at the trial of actions by virtue of their office and did not have commissions of Assize, etc. The law administered was Canadian, *i. e.*, French-Canadian, although trial by jury was allowed.<sup>16</sup> In 1794 these four Courts of Common Pleas were abolished and a Court of King's Bench created<sup>17</sup> with the same jurisdiction, civil and criminal, as the Courts of King's Bench, Common Pleas and Exchequer (on the common-law side) in England. This Court of King's Bench has been continued into and is now (with other courts consolidated with it) the Supreme Court of Ontario.

With the institution of the Court of King's Bench, the English system of Nisi Prius and Assize Courts was introduced. Before this time, as the Courts of Common Pleas had no criminal jurisdiction, commissions of Oyer and Terminer and General Gaol Delivery had been issued for each district,<sup>18</sup> and this practice continued after the Act of 1794.

The act provided that commissions of Assize and Nisi Prius should be issued into each district once or twice yearly as was thought proper for the trial of issues in vacation between terms; and power was given to issue special commissions to try special offenders, *i. e.*, special commissions of Oyer and Terminer.

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the trial judge in case of a conviction for crime to reserve any question of law which might have arisen on the trial for the consideration of the justices of either bench or the barons of the Exchequer. These, a Court for Crown Cases Reserved, had large powers but not the power to grant a new trial.

<sup>16</sup> A full description of these curious courts will be found in a series of articles, *The Early Courts of the Province* (1915) 35 CAN. LAW TIMES, a paper read before the Royal Society of Canada, May 28th, 1913, *Practice of Court of Common Pleas of the District of Hesse*, 7 TRANSACTIONS R. S. CAN. (3d Ser. 1913) 43 *et seq.*, and an Address before the Michigan Bar Association, June, 1915, *The First Judge at Detroit and his Court*—all by myself.

<sup>17</sup> By 34 Geo. III, Ch. 2 (U. C.).

<sup>18</sup> For example, the first chief justice of Upper Canada, William Osgoode, never sat in the Court of King's Bench, as he had left the province to become chief justice of Lower Canada before the Court of King's Bench in Upper Canada had been organized; but he sat several times in criminal courts under commissions of Oyer and Terminer and General Gaol Delivery. So, too, William Dummer Powell, afterwards chief justice of Upper Canada, when he was still first judge at Detroit (then British) in the Court of Common Pleas for the district of Hesse (afterwards the Western District) is known to have sat at criminal courts under such commissions (I have a photostat copy of one before me as I write).



It was not until 1855<sup>19</sup> that commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery were rendered unnecessary, Parliament providing that such courts should be held at such times as the judges of the courts of common law (by this time a Court of Common Pleas had been formed<sup>20</sup> with the same powers as the Court of Queen's Bench) should appoint. The judges of the courts of common law were to sit in these courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery with the same powers as though they had commissions as formerly.

By the Common Law Procedure Act of 1856<sup>21</sup> the times of the sittings of these trial courts were to be fixed by the judges, and the judges might sit with or without commissions as the Governor (*i. e.*, the Ministry) should deem best.<sup>22</sup> In 1874 the Administration of Justice Act<sup>23</sup> provided for Courts of Assize and Nisi Prius to be held without commissions and that any judge or Queen's Counsel presiding at any court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery should have all the powers which he would have had under commissions under the former practice.

It may be said that since the act of 1856 we have not had in Ontario commissions for trial courts, except special commissions of Oyer and Terminer, etc., the power to issue which is still continued and has been exercised.

When in 1881, the two common-law courts and the court of chancery were united in one court, the Supreme Court of Judicature for Ontario,<sup>24</sup> there was an express provision for commissions of Assize, etc., issuing by proper authority, but the existing condition was not interfered with that the ordinary trial courts should be held with or without a commission as the Governor (*i. e.*, the Ministry) should deem best. At the present time the days upon which such courts are to begin their sittings, and the judge who is to preside over each, are fixed by the judges of the High Court Division of the Supreme Court and no commission issued. But no power was ever given to a judge presiding at a trial court to grant a new trial: when the Courts of Queen's (King's) Bench and Common Pleas were separate and distinct courts, the application for a new trial must be made in term to the court from which process issued. When by the Judicature Act of 1881 the courts were amalgamated, there was still

<sup>19</sup> 18 Vic. Ch. 92, sec. 43 (Can.).

<sup>20</sup> By 12 Vic. Ch. 63 (Can.) in 1849.

<sup>21</sup> 19 & 20 Vic. Ch. 43, secs. 152, 153 (Can.).

<sup>22</sup> The legislation is continued and slightly amended in 1857, 20 Vic. Ch. 57, sec. 30; 1859, C. S. U. C. Ch. 11, secs. 1, 2, 3; 1866, 29 & 30 Vic. Ch. 40, sec. 3; all statutes of the province of Canada—after Confederation the Province of Ontario passed (1873) Ch. 8, sec. 52 (Ont.).

<sup>23</sup> (1874) 37 Vic. Ch. 7 (Ont.).

<sup>24</sup> By The Ontario Judicature Act of 1881, 44 Vic. Ch. 5 (Ont.).



as in England a division into divisional courts corresponding to the former separate courts; and for a time the application must be made to the divisional court of the division to which the action was instituted.<sup>25</sup> Such was the case where an action was tried by a jury: if the action was tried by a judge without a jury, the application was to the Court of Appeal. Later amendments permitted the application even in cases tried without a jury to be made to the divisional court if desired.<sup>26</sup> When actions ceased to be assigned to any division<sup>27</sup> and all writs were styled simply "In the High Court of Justice," the motion for a new trial was heard by any divisional court or the Court of Appeal.

All divisional courts of the High Court were abolished by an act<sup>28</sup> coming into force January 1st, 1913, and now all applications for a new trial must be made to the Appellate Division of the Supreme Court of Ontario, corresponding to the former Court of Appeal. It should be said that by rule in Ontario, as in some other provinces, the trial judge may grant a new trial where a party does not appear and judgment has gone against him.

It is not necessary to trace the history of the practice of new trial in the other Provinces; in none of them has the trial judge any power in that regard and the application must be made to the "court above."

<sup>25</sup> Before the Judicature Act of 1881, common-law actions were begun by writs which were issued from the two common-law courts alternately (in order to equalize the work of the two courts, each of which had the same jurisdiction, practice, etc.): proceedings in chancery were begun by bill of complaint. The Judicature Act abolished the bill of complaint and directed that all actions (now including suits) should begin by writ of summons, but that the writ should be styled in one or other division—Queen's Bench Division, Common Pleas Division or Chancery Division, secs. 23, 25. Writs in the Queen's Bench and Common Pleas Division were to be issued alternately, R. 21. The action was accordingly styled in some division and application for a new trial was made to the divisional court (generally of three but sometimes only two judges) of that division, R. 307. The application was by way of order nisi corresponding to the former rule nisi—in the Court of Appeal, a simple notice was given.

<sup>26</sup> When the rules were amended in 1888 (in force March 1st, 1888) it was directed that writs should issue alternately from the Queen's Bench, Chancery and Common Pleas Divisions (R. 226); and that after a trial by a judge without a jury, the application for a new trial might be made either to the divisional court or the Court of Appeal.

<sup>27</sup> By rules coming into force September 1st, 1897: R. 127, Forms 1, 2, 3.

<sup>28</sup> The statute 3 & 4 Geo. V, Ch. 19—The Judicature Act—brought into force January 1st, 1913, by proclamation. This forms one superior court, the Supreme Court of Ontario, with two divisions, the Appellate Division and the High Court Division—the latter being the trial division. I may add that while there has never been any express prohibition against the trial judge sitting in a court upon an application for a new trial in a case tried before him, it has never been done since the abolition of the practice of issuing writs out of a particular division.

## IN UPPER CANADA (ONTARIO)—CRIMINAL CASES

In Upper Canada the English practice was followed: there was no new trial in felonies, nor in misdemeanors in cases of acquittal except in certain *quasi*-civil cases.<sup>29</sup> In 1851 an act was passed<sup>30</sup> which enabled the trial judge in case of a conviction to reserve a case for the consideration of either common-law court, but it was held that this did not empower the court to grant a new trial.<sup>31</sup>

In 1857,<sup>32</sup> Parliament enacted that a person convicted of a crime might

“apply for a new trial upon any point of law or question of fact in as ample a manner as any person may apply to the Superior Courts of Common Law for a new trial in a civil action” and “if the conviction be affirmed the person convicted may appeal to the Court of Error and Appeal.”

If the conviction was in the Quarter Sessions, the application for a new trial must be made to that court and if the appeal should fail, a further appeal lay to a court of common law. In 1869,<sup>33</sup> all power was taken away from every court to grant a new trial. Thereafter the convicted person must rely upon a case reserved for one of the common-law courts; the appeal from the common-law courts to the Court of Error and Appeal was also taken away.

When the Criminal Code was enacted in 1892,<sup>34</sup> power was given on the refusal of the trial judge to reserve a case for the convict (with the leave of the attorney general given in writing) to move the Court of Appeal for such a case: when a reserved case should come before the Court of Appeal, that court might order a new trial or make such order as it should deem proper. If the judges of the Court of Appeal were unanimous, their decision was to be final; if not, an appeal might be taken to the Supreme Court of Canada.

Some changes have been made in the practice: at the present time the “Court of Appeal” is in Ontario the Appellate Division of the

<sup>29</sup> I mention only Upper Canada, but the English criminal law was in force in Lower Canada from 1763; and the laws of the two provinces in criminal matters have always been practically the same.

<sup>30</sup> 14 & 15 Vic. Ch. 13 (Can.) passed by the Parliament of United Canada—the two Provinces of Upper and Lower Canada became one Province of Canada by the Union Act of 1840, 3 & 4 Vic. Ch. 35 (Imp.) coming into effect February 10th, 1841, and so continued until the formation of the Dominion of Canada by The British North America Act of 1867, 30 & 31 Vic. Ch. 3 (Imp.) coming into effect July 1st, 1867.

<sup>31</sup> *Reg. v. Baby* (1854) 12 U. C. Q. B. 346: the act was much like the English Act of 1848 referred to above which also was held not to enable a new trial to be granted.

<sup>32</sup> 20 Vic. Ch. 61, secs. 1, 2, 4 (Can.): Cf. C. S. U. C. Ch. 113, secs. 1, 3, 6, 7.

<sup>33</sup> By 32 & 33 Vic. Ch. 29, sec. 80 (Dom.).

<sup>34</sup> (1892) 55 & 56 Vic. Ch. 29 (Dom.), The Criminal Code of 1892.



Supreme Court of Ontario, and a convict may move without the leave of the attorney general; if he moves on the ground of weight of evidence, however, he must obtain the leave of the trial judge.<sup>35</sup>

#### IN THE UNITED STATES

The common law of England became the common law of the United States as it had been the common law of the thirteen colonies: while there is no report of any decision in the colonies before the Revolution granting a new trial, there is no doubt that the courts of general jurisdiction exercised the power of granting new trials in proper cases.

The *Nisi Prius* system was not in vogue and the trial judge (at least in most cases) sat as the court and not as a mere commissioner; and he it was to whom the application for a new trial was made. In Massachusetts the *Nisi Prius* system was adopted in 1803-4 with the necessary consequence:<sup>36</sup> but in most cases the trial judge was always "the court."

In some of the states the losing party could have a new trial as of right by merely claiming an appeal as in Massachusetts,<sup>37</sup> Connecticut<sup>38</sup> and some other states.

<sup>35</sup> R. S. Can. 1906, Ch. 146, The Criminal Code, secs. 1013, 1014 (proceedings in error prohibited), 1015, 1016, 1018, 1019, 1021, 1024. Sec. 1022 gives power to the minister of justice to order a new trial if he "entertains a doubt whether such person ought to have been convicted." This power has been exercised once and (I think) only once. Practice in criminal cases, like criminal law in general, being by The British North America Act (the written constitution of Canada) entrusted to the Dominion, criminal practice is now uniform throughout the Dominion.

<sup>36</sup> See *Miller v. Baker* (1838, Mass.) 20 Pick. 285, 288, *per* Shaw, C. J., delivering the judgment of the court.

<sup>37</sup> See *U. S. v. 1363 Bags of Merchandise* (1863, U. S. D. C. Mass.) 2 Sprague, 85, 86 (25 MONTHLY LAW REP. 600), *per* Sprague, J., who adds:

"If the second verdict was the same as the first, it was conclusive unless the court, in its discretion, should see fit to set it aside. If the result of the second trial was different from that of the first, the losing party had a right, by a process of review, to have another trial. The losing party in the third trial, having had two verdicts against him, was concluded thereby, unless the court should grant him a new trial. By this system it was not thought safe to rely upon the finding of a single jury. A party could claim a re-trial as matter of right until two verdicts had gone against him, and even then the court had the power to grant another trial if in their discretion they should deem it proper. This system commenced at an early period, and was in operation for a long time. It continued for some years after Maine became a separate State. I had then some agency in bringing about a change."

"*O fortunatos nimium sua si bona norint advocati.*"

<sup>38</sup> *Bartholomew v. Clark* (1816) 1 Conn. 472, 473, *per* N. Smith (*arguendo*) ". . . which was granted of course to the unsuccessful party, until there had been two verdicts the same way." The reporter, Thomas Day, adds a note: "This practice still exists, to a certain degree, in some of the New-England states." It certainly did exist in Massachusetts, as Maine did not become a separate state till 1820,—and we have seen that the practice was in vogue in Massachusetts at that time.



But the rule in granting new trials became much the same as in England in respect of grounds for such a proceeding. At the present time in practically every state of the Union, the trial judge has power to grant a new trial.<sup>39</sup> New Jersey is an exception: there the practice is to apply to the trial judge for a rule to show cause why the verdict should not be set aside and a new trial ordered (the common-law rule nisi); the rule is then argued before the full court (the trial judge being a member) in term. This is substantially the common-law system, except that in New Jersey it is the trial judge and not the court *en banc* who grants the rule to show cause.

In most of the states it is considered that the power of the trial judge to grant a new trial is purely statutory: but in some it is considered that the right is "inherent in the trial court" (Alabama), that the right is a common-law right (Massachusetts, Michigan, Minnesota), but regulated and modified by statute (Missouri, New York, North Carolina, Wisconsin). Connecticut thinks it an affirmation of the common law; Indiana can trace her statutory power back to 1852; Maine derived her jurisprudence from Massachusetts but now it seems to be wholly statutory.<sup>40</sup>

The decision of the trial judge is final in Delaware, Maine and New Mexico; where a new trial is granted there is no appeal in California (though the order is reviewable on an appeal from the judgment), Colorado, Indiana, Michigan, Minnesota, Missouri (in criminal cases); in North Carolina an appeal from the trial judge's decision is allowed only when a new trial is granted on the ground of error committed in the trial, while in South Carolina the supreme court cannot review the facts and can grant a new trial only where a question of law is involved on which the trial judge has made an erroneous finding.

In the other states named in note 39, there is an appeal from the decision of the trial judge.

I have not considered the case of inferior courts: in all instances any power they possess to grant a new trial is statutory; nor have I considered the *venire de novo* employed where the verdict was defective, etc.—in some states, *e. g.*, Indiana, that is considered not affected by legislation.

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<sup>39</sup> I have to thank the chief justices of the following states for their ready and courteous answers to my enquiries: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Wisconsin, Wyoming.

I have not made an independent examination but have contented myself with the information these eminent gentlemen have given me either expressly or by reference to authority.

<sup>40</sup> See *Averill v. Rooney* (1871) 59 Me. 580, Laws of 1872, Ch. 83: R. S. (1903) Ch. 84, sec. 54.

## DOES A PRE-EXISTING DUTY DEFEAT CONSIDERATION?—RECENT NOTEWORTHY DECISIONS

ARTHUR L. CORBIN

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The problem of *Shadwell v. Shadwell*<sup>1</sup> has recently come before the New York Court of Appeals in the case of *Attilio De Cicco v. Schweizer*.<sup>2</sup> The facts of the two cases have much similarity. In the New York case a written document was prepared containing the following:

"Whereas, Miss Blanche Schweizer, daughter of Joseph Schweizer . . . is now affianced to and is to be married to Count Oberto Gulinelli. Now, in consideration of all that is herein set forth, the said Joseph Schweizer promises . . . to pay annually to his said daughter Blanche . . . the sum of two thousand five hundred dollars."

This was delivered to the count, and four days later the marriage took place. For ten years the payment was made, and the present suit was brought to recover the eleventh annual instalment. The plaintiff sues as assignee of both the daughter Blanche and her husband. The court holds that there was sufficient consideration for the defendant's promise, thus agreeing with *Shadwell v. Shadwell*.

Some of the inferior courts of New York have failed to recognize the general distinctions between bilateral and unilateral contracts, speaking of the latter as if they were not contracts at all but were mere unenforceable unilateral promises, void for want of acceptance and consideration.<sup>3</sup> In the present case the Court of Appeals makes no such mistake. The contract is plainly described as "unilateral," and the defendant's promise is enforced because the acts of acceptance constituted a sufficient consideration. Neither the count nor the defendant's daughter made any promise, and the court assumes that the contract became binding upon the defendant only when the marriage was celebrated.

This decision deserves extended comment because the opinion by Mr. Justice Cardozo shows a clear understanding of a unilateral contract and familiarity with the best literature on the subject in both books and periodicals, because the decision is correct in principle and in policy, and because it very probably will be a starting point in the reversal of a large number of decisions and in the abandonment of a

<sup>1</sup> (1860) 9 C. B. N. S. 159, 30 L. J. C. P. 145.

<sup>2</sup> (1917, N. Y.) 117 N. E. 807.

<sup>3</sup> See *Meade v. Poppenberg* (1915) 167 App. Div. 411, 153 N. Y. Supp. 182; *Fisk v. Batterson* (1914) 165 App. Div. 952, 150 N. Y. Supp. 242.

# YALE LAW JOURNAL

DEVOTED TO THE  
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# COMMON LAW AND COMMON SENSE<sup>1</sup>

WILLIAM RENWICK RIDDELL

Supreme Court of Ontario

Early in the last century (1804), Mr. Smith, an eminent lawyer of Woodbury, Connecticut, in an eloquent and impressive argument before the Supreme Court of Errors<sup>2</sup> indignantly disputed the proposition of Lord Mansfield stated in *Corbett v. Poelnitz*.<sup>3</sup> "That as the times alter, new customs and new manners arise, and new exceptions and applications of the rules of law must be made." Inveighing against the sins of England, he exclaims:

"And, to be sure, manners have there led the law and law the manners, till all barriers are thrown down. And are we to go on in their tracks, not by degrees, but to take at once the last step which corruption has there introduced and bury in oblivion the principle that a *feme covert* has no separate existence?"<sup>4</sup>

Counsel had never heard in Connecticut of exceptions to the marriage contract so that the wife need not lose her independence, or of relatives giving property to married women to their separate use; and he warmly insisted "that the generosity of our females has not allowed them to wish to keep their property from those to whom they have not refused their persons."

The Supreme Court of Errors, sitting at Hartford, to whom this typical argument was advanced, was composed of Jonathan Trumbull, the governor,<sup>5</sup> Lieutenant Governor John Treadwell and ten assistants, all unknown to fame except Oliver Ellsworth, afterwards Chief Justice of the Supreme Court, of whom la Rochefoucault-Liancourt, in that most delightful of all works of travel, his *Voyage dans les Etats Unis d'Amérique*, thus speaks (he calls him "Elleword," but that is a detail):

*"Les Américains qui passaient avec nous et qui presque tous étaient des jeunes gens n'avaient pas plus d'égard pour lui que pour*

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<sup>1</sup> The substance of this article was contained in an address delivered before the graduating class of the Yale School of Law.

<sup>2</sup> *Dibble v. Hutton* (1804, Conn.) 1 Day, 221, 224.

<sup>3</sup> (1785) 1 T. R. 8.

<sup>4</sup> One is irresistibly reminded of the address to a jury attributed to Erskine—or sometimes to Scarlett, who though bright was not deep-read: "Gentlemen of the jury, the reputation of a cheesemonger in the city of London is like the bloom upon a peach. Breathe on it!—and it is gone for ever."

<sup>5</sup> Not the original Jonathan, Washington's "Brother Jonathan" who, beginning as a clergyman, ended up as a judge, but his son.

See I. W. Stuart, *Life of Jonathan Trumbull, Senr.* (Boston, 1859).

*le maître d'hôtel nègre, et cependant c'est, après le Président le second, peut-être le premier personnage de l'Union."*<sup>8</sup>

That court stood by the old ways—*steterunt super vias antiquas*:

"the maxims of the ancient common law . . . are plain and simple; our state of manners and society do not require that they should be relaxed or qualified. The principles . . . of the common law remain unimpaired."

When after 1783 some thousands of Americans passed from the new republic, chiefly from New York, Pennsylvania and New Jersey, but some from Connecticut and other parts of New England, across the international rivers into northern wilds, many of them victims of as gross a disregard of treaty as ever has been witnessed in history—at least until the present decade—they took with them that same common law which was the object of the reverence and devotion of Mr. Smith and the court he addressed in Connecticut.

The French-Canadian might wonder that they should think their property safer in the determination of tailors and shoemakers than in that of their judges—they were French and did not know any better;—but the man of English descent, saturated with the common law could not endure any other. The French-Canadian law, the *Coutume de Paris*, had been reintroduced into all Canada by the Quebec Act of 1774, greatly to the delight of the French-Canadian but much to the disgust and indignation of the English-speaking inhabitants. In the old province, the French largely predominated, but when the new settlers came into the upper part of the British territory, the English-speaking largely outnumbered the French there. The result might have been disastrous, since neither race could be satisfied with the law of the other; but the lesson of 1776 had been well learned. Britain, always sincerely anxious for the well-being and well-doing of her colonies—some school histories to the contrary notwithstanding—and she did make mistakes—had thoroughly learned that the colonies and the colonists must be and do well in their own way and not necessarily in hers; that the way to make colonists contented is to let them alone, and that in most instances they know infinitely better what is best for them than any statesman three thousand miles across the sea, however enlightened and however benevolent.

Accordingly the wise scheme was devised of making two provinces, one in most part populated by the French-Canadians, the other in most part populated by the newcomers, Americans. The Con-

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<sup>8</sup> *Voyage dans les Etats Unis d'Amérique fait en 1795, 1796 et 1797; par la Rochefoucault-Liancourt à Paris l'an VII de la République, tome Quatrième, 2, 3.* "To whom our American fellow-passengers, most of them young, showed no more respect than to the negro waiter, and yet he is after the President, the second, perhaps the first, personage in the Union."



stitutional or Canada Act of 1791 formed two provinces, Upper Canada and Lower Canada, and gave to each full power of legislation, civil and criminal. In 1792, when the parliaments met in the two provinces, while the French province, Lower Canada, retained its law, the upper province by its very first act introduced the law of England, and by its second the full jury system.<sup>7</sup> So strongly devoted to the common law was Upper Canada that she went for nearly half a century without a court of chancery—her first court of chancery not appearing till 1837. What was the cause of this intense attachment to the common law of England shared in by all of English stock—indeed, by all who spoke English, for the Scot, having come to a common-law country, soon forgets his Scottish law, based as it is on the civil law of Rome, and cleaves to the English law?

For Upper Canada we may say that she was a British possession formed into a state by an Act of British Parliament; but Connecticut formed her own constitution, and

"so far as its provisions are concerned the King and Parliament . . . might as well have been non-existent. It is made . . . on the authority of the people . . . its objects are to establish an orderly and decent Government . . . and for these purposes its authors do . . . associate and conjoin themselves to be as one Public State or Commonwealth."<sup>8</sup>

Is not the real reason to be found in the belief that the common law is the perfection of human reason—in a word, that the common law is common sense? What we call "common sense" is not the old metaphysical common sense, nor is it the sentiment which might be conceived to flow from lofty and altruistic philosophy; but it consists in the application of the rules of justice and honesty to the things of this work-a-day world, so full of anomalies and of fallible, imperfect, human beings.

A well-known English judge, watching village children drawing up rules for their cricket team for the year, said they were showing him how the common law of England was made. I venture to think that this view is not quite correct. The common law was no set of rules purposely drawn up for the governance of the community but rather a set of customs which evolved into form in the course of years. Now and then, indeed, the sovereign power intervened to modify the old rule or prescribe others; but in most cases where the judge was called on to give a decision he was not like the umpire at cricket

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<sup>7</sup> This is more fully explained in articles on the *Early Courts of the Province (Ontario)*, CAN. LAW TIMES (1915) 879, 964.

<sup>8</sup> See *The Genesis of a New England State* (Connecticut), by Alexander Johnston, A.M., *Johns Hopkins University Studies*, No. XI, Baltimore (Sept. 1883) 14, 15. The language has been here slightly modified and the archaic spelling modernized.

or baseball, sent to his body of formal and fixed rules to find out what should govern and to decide according to the rule prescribed; he was rather like the friendly arbitrator deciding according to what he considered the requirements of decent neighborhood, that is "the customs of the country"—*Sittlichkeit*, if you will. Every time he made a decision, he made the custom more definite. He did not, indeed, affect to lay down any new rule or to govern himself by any but the existing sense of the community—that is, what was just and right in the particular case, bearing in mind the customs which were followed and which fixed rights and duties, more or less indefinitely indeed, but nevertheless fixed them. But every time, he used his own sense of what was just and right in the particular case. Every art tends to become a science, practice inevitably demands theory, and when law came to be written it was rather deductive than inductive: the judgments were examined, and from them the general rule was deduced. The real law is always the state of the decisions for the time being, whatever may be the state of the rules supposed to be binding.

"One-third of a judge is a common juror if you get beneath the ermine," says Lord Bramwell, and the other two-thirds may not be far different. A judge is necessarily the creature of his times. In our system the judge comes from the bar; he is not educated as a judge, but as a lawyer, who handles matters of everyday life, and is in close touch with the people. The common sense of the judge was not far away from the common sense of the mass of the people—and the *dicta* of the judge recommended themselves to the people because they were much the same as they would themselves have uttered had they been articulate.

So long as the law was unwritten, there was no difficulty in the evolution of legal precept keeping pace with social and international evolution. But *littera scripta manet rigescitque*: once the decision is written, it cannot be overlooked, nay, it must be followed, and law necessarily becomes fixed, unyielding, in a sense arbitrary.

Common sense is not the same in all ages. In the times of Matthew Hale, common sense told everyone that there were such things as witches.<sup>9</sup> Was one blasphemously to assert that the Almighty did not know what he was talking about when he said, "Thou shalt not suffer a witch to live?" Were there not many cases in which old women had confessed their sin and even boasted of it? What other explanation could be given of the abnormal phenomena—they called them "wonders"—so often witnessed than that they were produced by the power of Satan? Not only in the mother country but on this side of the Atlantic, not only at Suffolk, England, but at Hartford,

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<sup>9</sup> Cf. Leckie, *History of Rationalism*.



Connecticut, unfortunate beings, more than half convinced of their own guilt, suffered the extremity of the law for a crime which *our* common sense tells us does not exist. The conception of witchcraft is to us hardly consistent with sanity. Was the whole nation then insane?—for no doubt there is much truth in Butler's contention that nations may become insane, like individuals. It may indeed be that the present age is witnessing such a phenomenon. Insane? Not at all, but wholly sane, considering their light and the available evidence.

So in the case of the woman. The first woman was made subject to the first man; in the first reported criminal trial the judge pronounced the sentence, "He shall rule over thee"—and of course the subsequent women must be subject to the subsequent men. Then, too, in the state of society when the common-law rules were in the making, the woman could not be of much avail in making property or in keeping it—working or fighting to procure or to protect. She was weak compared with the man, and craft had not yet come into its own. It "stood to reason," then, that every woman should have a man for a master, and that she should not be trusted with property which she did not make and which she could not keep. It was much that she was allowed an immortal soul of her own; all else was properly and naturally her husband's. If some one beat her or otherwise injured her, the husband should sue, for he was the master and he was the injured party.

It is difficult for us to breathe in the intellectual atmosphere in which such were the real views of the community; but that community was wholly sane and their views were common sense. That common sense, however, passed away with a speed more or less rapid at various periods; and justice demanded the recognition of woman's rights in her own property.

Equity had of course done something, but not enough; the common law *riguit*, was inflexible and unbending; and the legislature had to interfere. Accordingly, in some places sooner, in others later, the married woman was declared to be a human being with the ordinary rights of property as a human being. This terrible change in the law, the very thought of which so shocked the sages a century ago, does not seem to have destroyed society. God is still "in His heaven and all's right with the world."

In a late volume of the Connecticut Reports I find it solemnly laid down that a woman may sue her husband for an assault and battery committed on her person.<sup>10</sup> Shades of Coke and Blackstone! Some fine morning the community may wake up and actually find that a married woman may be intrusted with a voice in selecting those who are to make laws for her, with no greater danger to the state than

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<sup>10</sup> *Brown v. Brown* (1914) 88 Conn. 42.



that caused by giving the vote to the emancipated negro or the immigrant not far removed in time or in intelligence from serfdom.

Whether this change will be welcomed or not must depend on the state of mind of the community, whether more or less intelligent, less or more reasonable—I decline to express any opinion whether it is the less or the greater amount of intelligence and reason which will determine a change.

Now to another bit of history. As I write these lines, I have before me a little volume,<sup>11</sup> written ninety years ago by the Reverend Ammi Rogers, a minister of the Episcopal church, who seems to have had rather a hard time of it in his day. He barely escaped imprisonment in the Newgate of Connecticut at Simsbury (now East Granby), and was imprisoned for 731 days in the Norwich jail—just for being a Republican, he says. *Quis talia fando temperet a lacrymis?* There was indeed a trifle of a conviction for crime—but we are assured that the charge was false (which indeed is likely enough), and would not have been prosecuted but that he opposed the Presbyterian or Federal party—*credat Judaeus Appella*. He says:

“In Connecticut every settled congregational Presbyterian minister can send his collector and take any man’s horse from under him, or his oxen or cows or hogs, or any property which he possesses, unless he has signed off<sup>12</sup> and can sell it at the post without suing him or granting him a hearing. I have known them take even a man’s Bible and sell it at the post to pay the minister’s tax. I have known Episcopalians, Baptists and others actually locked up and confined in a filthy disgraceful jail in Connecticut merely because they would not or could not in conscience pay their money to support that which they did not believe to be true.”

The common law—whether assisted or not by royal edict or legislation is of little importance—early settled that “an honourable and

<sup>11</sup> *Memoirs / of the / Rev. Ammi Rogers, A. M., / a Clergyman of the Episcopal Church, educated at / Yale College in Connecticut, ordained in Trinity / Church in the City of New York / Persecuted in the State of Connecticut on Account / of Religion and Politics for almost Twenty Years / . . . Composed, Compiled and Written by the said / Ammi Rogers / Late Rector of St. Peter's Church in Hebron, Tolland Co., Conn. Etc. / . . . Second Edition / Schenectady Printed by G. Ritchie, Jun. / 1826, 12 mo, 272 pp.* The quotation is from p. 51.

<sup>12</sup> A delicate touch—fraudulent conveyances have been in use ever since there have been conveyances: but just to think of anyone trying in this way to beat the parson!

My friend, Governor Baldwin, informs me that I have quite misapprehended the meaning of “signed off” in the connection. He says that “signing off” was the filing with the proper authorities of a paper certifying that the person belonged to some other religious body, and he gives me an instance of one gentleman’s filing a certificate something like the following:—“I, John Smith, hereby certify that I have ceased to be a Christian and have joined the Episcopal Church.”

competent maintenance for the ministers of the gospel was *jure divino*," that those who separated from the world for the sake of the rest of mankind had "a right to be furnished with the necessities, conveniences and moderate enjoyments of life at the expense of those for whose benefit they forego the usual means of providing them."<sup>13</sup>

One has only to read Gladstone's *Church and State* to see how entirely reasonable such a state of the law is—provided he belongs to the favored church. The Dissenter, whether Presbyterian as in England or Episcopalian as in Scotland and old Connecticut, can never be persuaded that the logic is sound; but then he is a dissenter.

The common sense of the people then in Connecticut, as now in certain other parts of the globe usually looked upon as civilized, considered that the value of true religion was such that all legitimate means should be used to spread it, including support of its teachers by the community from public funds; that all should contribute to these funds and this support—the only question open being, "What is the true Religion?" Connecticut settled that early and conclusively; it was the particular brand offered by the Congregational Presbyterian.

In Upper Canada we had not such an easy task. First, the Church of England, or Episcopalian, claimed a monopoly of state support, derived from the sale of land, the "Clergy Reserves"; then the Established Church of Scotland claimed a share and had its claim allowed. Other religious bodies asserted equal rights with these, but *Non est bonum sumere panem filiorum et mittere canibus*, and the favored churches grudged even that *Catelli edunt de micis quae cadunt de mensa dominorum suorum*.<sup>14</sup> Our people at last grew tired of the jangle, and took away the land—or such of it as was left—from the churches altogether, and applied it to education. We have a brutally direct way of doing things in my democratic country, and have no trouble over constitutional limitations.<sup>15</sup>

Our common sense changed; so in Connecticut the common sense of the people changed, and now one would be looked upon as not far from a lunatic who should propose a return to the old practice. I do not think that even the "settled congregational Presbyterian minister" regrets the change or would desire to take a man's horse from under him even if he had not "signed off"—not to mention the "man's Bible."

About the year 1802, one Joel Goodyear sued the administrators

<sup>13</sup> 2 Tomlins, *Law Dictionary*, *sub voc.*, "Tythes" I.

<sup>14</sup> Vulgate version, Matt. XV. 26-27.

<sup>15</sup> "The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body . . . We have no such restriction upon the power of the legislature as is found in some states." *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908) 18 ONT. L. REP. 275, 279, *per* Riddell, J., affirmed in the Court of Appeal and the Judicial Committee of the Privy Council.



of Joel Bradley in "an action of book debt," and at the trial in the Superior Court of Connecticut,<sup>16</sup> he was allowed to give his own evidence to establish that he had sent the decedent \$100 in cash by his negro to apply on his promissory-note. This would never do. The defendants appealed, and by two eminent counsel urged that the "principle adopted by the Superior Court would enable any man to swear away his own note of hand." Counsel on the other side were not so bold as to contend that a party could be allowed to give evidence in his own behalf in an ordinary case, but they argued that it was different in an action "where the plaintiff charged the defendant on book." The Supreme Court of Errors was adamant. "The plaintiff cannot in any form of action avail himself of his own testimony"—notwithstanding a previous adjudication by the court, of which "the consequences which have followed probably were not then foreseen."

At the common law, common sense taught that anyone allowed to give evidence on his own behalf would perjure himself. As Bentham puts it, "every defendant is *par etat*, by his station in the cause, a liar, a man who if suffered to speak would be sure to speak false"—in other words, a litigant is a liar *ex officio*.<sup>17</sup> Accordingly, from this presumed want of integrity, all parties are excluded from giving evidence.

Once this was sound common sense, wherever the common law prevailed; but the common sense has changed almost everywhere. Connecticut is considered by some to have led the van when in 1849 she removed all disqualification on the ground of interest,<sup>18</sup> and not for two years afterwards did England take the same step for all courts, though she had launched the experiment in certain courts in 1846.<sup>19</sup>

But I claim priority for my province. As early as 1792<sup>20</sup> in erecting courts of requests for the easy and speedy recovery of small debts, the parliament of Upper Canada expressly provided that it should be lawful for the justices "to administer an Oath to the Plaintiff or Defendant as well as to such Witness or Witnesses as shall be produced by each Party." It is true that we did not introduce this into the superior courts till 1856; but then we are not a logical people.

For more than half a century in most jurisdictions the theory that a party must not be allowed to give evidence on his own behalf has been effete, and no one but a fool would suggest its reinstatement—that is, he would be a fool only if, in making such a suggestion, he had in contemplation a civil action.

<sup>16</sup> *Bradley v. Goodyear* (1803, Conn.) 1 Day, 104, 105.

<sup>17</sup> I once heard a college president say "a College President is a liar *ex officio*"—he proved his own *status*—for if he told the truth he was a liar.

<sup>18</sup> Wigmore, *Evidence* (1904) par. 577, note 4.

<sup>19</sup> *Boyle v. Rothschild* (1908) 16 ONT. L. REP. 426.

<sup>20</sup> See Statutes of Upper Canada, 1792, 32 Geo. III, ch. 6, s. 3.



In many jurisdictions one charged with a crime is not allowed to give evidence on his own behalf; the person who must know most about the facts has his mouth closed. Why? Because he is apt to disregard the truth and may perjure himself?—But that fear we disregard in civil actions. Because he may injure his own case?—Why shouldn't he, if he wants to? In some jurisdictions the accused is permitted, but cannot be compelled to give evidence on his trial. That is our law in Canada.

"This restriction is part of, or intimately connected with the traditional law that no one should be compelled to condemn himself. There was reason in such a rule when the criminal was not uncommonly one who had offended the powers that were, and too often it was to be feared that the self-condemnation was brought about by torture. But now the criminal is always the enemy of society, of the people and not of the king or government. No one desires the destruction of the accused because he is he, and irrespective of whether he has committed a real crime. The whole concern of the prosecution is (or should be) to investigate whether the accused has committed an offence against the people; not only does the law not desire the punishment of an innocent man, it does not desire the punishment of a man who cannot be proved guilty."<sup>21</sup>

Not being a prophet or the son of a prophet, I do not venture to predict that at some time in all common-law countries the accused will have just the same rights as a defendant in a civil suit, nor do I try to bring on that time anywhere. Every people has the government it deserves—leaving aside cases of physical force,—so every people should have the law with which it is satisfied.

If there is one matter more than another which excites the interest of an Ontario lawyer in the courts of some of the states of the Union (I except of course the enormous length of time taken in trials), it is the devotion to the jury system. This is a cardinal characteristic of trials at the common law, and most common-law countries insist upon its retention. With us, it is the exception that a civil case is tried by a jury—and indeed, the vast majority of criminal cases are also disposed of by a judge. I shall speak chiefly of the civil side.

Looking at the matter from an *a priori* point of view, there is no magic in a jury trial; there is nothing at all inherently necessary to an English-speaking community in the "institution" of the jury. Take, for example, the history of Connecticut. The wealthy and somewhat aristocratic body of immigrants who arrived on this continent from England in 1637, and, resisting the inducements held out at Boston to settle in Massachusetts, came the following year and founded a colony of their own, New Haven, differed in one respect at least from the poorer immigrants who a year or two before had

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<sup>21</sup> The quotation is from an address delivered before the Wisconsin Bar Association at Green Bay, Wisc., June, 1914.

come from Massachusetts and settled in and near Hartford—the "Connecticut" Colony. Hartford or "Connecticut" provided for trial by jury; New Haven did not; and there is no record or tradition indicating that the New Haven courts were any less effective in doing justice than those in the colony up the river or in its Say and Sele purchase at Saybrook. That the jury system conquered in Connecticut (as elsewhere), was one more of the indignities to which this aristocratic but unhappy settlement was forced to submit by way of penance for its slackness in hunting down the regicides Goffe and Whalley and its want of promptness in recognizing that the King had come to his own again.

For long it was bad law, and for longer, bad form, for a judge, trying a case with a jury, to express an opinion on the evidence—except indeed in a government prosecution; the unfortunate who set himself up against the constituted authorities had of course no rights. In some jurisdictions the law still is that the judge must not express his opinion on facts; the common sense of such communities tells them that if you have a jury trial you should have a trial by jury; the judge is there simply to act as an umpire—"to see fair"—and declare the law.

Judges do not like to be thus limited in their activities—*crede experto*—and in some places sooner, in some places later, they began to express opinions. Even as late as the middle of the last century we are told by a celebrated English solicitor:

"In fact, in trials by jury (and no causes were or could be tried without a jury) the presiding judge was supposed to be impartial—or rather, to express no opinion, but in summing up merely to explain the law and read or refer to the evidence given on the one side and the other, without intimating his own view or openly endeavoring to influence the jury as to the verdict they should give. But this kind of impartiality was dying out."<sup>22</sup>

So in Connecticut, at least as early as 1851, it was laid down as clear law that the trial judge had the right to give in his charge a clear expression of his own opinion, so long as he made it plain that

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<sup>22</sup> *Jottings of an old / Solicitor / By Sir John Hallams / London / John Murray, Albemarle Street W. / 1906.*

He says

"it became common for counsel to impress on jurors that it was for them to decide and that they ought not to be influenced by the Judge. I well remember a trial at Guildhall before Chief Justice Jervis . . . in which Serjeant Wilkins made, as was his wont, a very excited speech to the jury in replying for the plaintiff, and concluded by saying 'I tremble for liberty, I tremble for justice, I tremble for my country, when I find a Judge ignoring his position of impartiality, usurping the functions of a jury, the safeguards of the liberties of Englishmen and endeavouring to deprive my client of that unbiassed verdict of a jury of his country to which he is entitled.'"



he did not intend to "direct or control" the jury.<sup>23</sup> From that, the state has never departed. In my own province the same law has been followed from time out of mind.

That practice has recommended itself to the common sense of some peoples; but others have not yet been infected with the virus, and still think that a jury trial is a jury trial and the litigant has the right to the opinion of a jury uninfluenced by the umpire. That the umpire may promptly set aside a finding which he thinks not in accordance with the evidence is a detail; there is, anyway, the chance of another jury, and another; and courts sometimes get tired of setting aside verdicts. Logical consistency is on the side of this practice; but since when has an English-speaking people cared for consistency? What works well is with them all right, even if it is not logical. A Frenchman will fight half a dozen duels before breakfast for a principle; but the practical "Anglo-Saxon"<sup>24</sup> cares only for a practice; theory is a beautiful thing, but we want something that will do good work in this work-a-day world.

Not to worry about logic and consistency, is there any good reason why the judge, a trained observer accustomed to hear and weigh evidence, better educated than most jurors and presumably of higher intelligence and capacity (the presumption is not *juris et de jure*), should not help the jury, not only by reading to them the evidence, but also by giving fully and fairly his own views of its weight and effect? Counsel do that from one point of view and the other; why not the judge from an impartial point of view? The answer of the common sense of the community will determine the course of the courts; for every community has the law it wants.

In most common-law countries we have not got to the standpoint of the French-Canadian a century and a half ago; tailors and shoemakers are still preferred to judges in determining the rights of litigants. True, in a very large class of cases, a chancellor or other equity judge may sit and determine not only law but also fact. Why should the same thing not be done in other cases? The distinction between legal and equitable issues is of course historical; there is no difference in ethics or morals; and (leaving aside history) it is hard to see why a judge who can satisfactorily decide a question of fact

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<sup>23</sup> *First Baptist Church and Congregation in Stamford v. Rowe* (1851) 21 Conn. 160, 166. Stamford, now I understand a most decorous place, was in early times the most unmanageable of the towns of Connecticut. Colonized from Wethersfield, one of the three Connecticut towns, bought by New Haven in 1640, it became and long remained a thorn in the side of the grandees of New Haven.

<sup>24</sup> I use the wholly incorrect and somewhat misleading terminology for want of a better. I mean those who speak English and are either of English descent or have adopted the English conception of legal and political right, law and government.



in a proceeding on a mortgage or a trust should not do equally well in a proceeding on a contract or a trespass. Why the practice should be followed of a judge directing a jury to find so-and-so instead of his trying the issue himself and doing his own finding, is well deserving of careful consideration. There may be many cases of fact which a judge prefers that a jury should determine; and one can see no objection to that course in such cases—generally very simple and depending on the relative credibility of witnesses. But in most cases, is not the judge more likely to be right than the “tailors and shoe-makers”?

In our Ontario practice no one is entitled as of right to a trial by jury excepting in cases of libel and the like. If anyone desires a jury trial, he files a notice for a jury, but the trial judge determines whether the case shall be tried by a jury or not; and even if neither party has filed a jury notice the judge may order a jury to be called. An enormous amount of time is saved by dispensing with a jury. There are no opening addresses and the final addresses are cut short; objections to evidence lose much of their importance, oratory is at a discount and lucid sensible argument at a premium. The common sense of our people says that is an improvement. That of other people will depend upon what they wish the courts to be and what they think of their judges.

A people which really thinks the court a place of amusement, a stage for the display of oratory, and a lawsuit an interesting game to be won by technical skill and ability to take the measure of a jury's foot, or which does not trust in the integrity and capacity of its judges, will of course insist on the traditional method of trial; but if the judges are trusted both as to their ability and as to their honesty, if a lawsuit is conceived of as a real means of doing real justice and of giving every man his own, there surely can be little question what course will, at least in most cases, be adopted. Even if a jury be insisted upon—and in criminal cases few English-speaking communities have abolished the jury in the most serious cases, even on consent—the time taken in securing a jury is sometimes a public scandal.

I was recently told by a brother judge that it had taken him an hour to empanel a jury to try a certain criminal case which excited much public interest in Toronto. Until that day I had never heard of it ever taking more than half an hour to procure a jury in my province, and my experience is neither small nor unique. When we Canadians hear of it taking days, weeks or even months to swear a jury, we involuntarily clap our hands on our pockets; we know we could not afford any such luxury, and marvel at any others being able to stand it.<sup>25</sup> Whether the common sense of such other com-

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<sup>25</sup> I have more than once told the story of my going as a trial judge to a Canadian city along the same line of rail that would have landed me in a few

munities will abolish what to Canadians looks so absurd, will, as in all such matters, depend on the view taken of the true function and object of the courts.

Passing from this subject, I would say a word or two as to "practice." If courts are to be held as a means whereby the citizen may vindicate his rights, much attention must be paid to the methods through which this object is to be attained. It is inevitable that general rules should be laid down for the conduct of litigation, and it is natural that these rules should tend to become rather an end in themselves than a means toward an end.

The old law of procedure was like everything primeval—a matter of custom, formal; it gave much weight to set words, set phrases, fixed methods. Everything in a primeval community partakes of the nature of a religion, a magic; formulae are sacred; to depart from them fatal; this way is right, all else wrong. But as life becomes wider, more complex, the value of mere words goes below par, and facts press their claim. A slip in practice is thought to be only a slip and not a crime or a fault of such gravity as to deprive him who made it, or his client, of his rights. It is no doubt a very nice thing to have a perfect record without blot or interlineation or defect; but it is of much more importance that a litigant should have his rights.

And now, in all communities really civilized, a technical court which *haeret in cortice* is considered a scandal; errors made by a lawyer in reducing to writing his client's case are punished, if necessary, by costs, but are not allowed to interfere with justice according to the very right of the matter, according to the facts established and not according to the language in which a writer has expressed a claim. Once a community has advanced to the stage in which its common sense teaches that rights depend upon facts and not upon statements, upon facts and not upon technical skill in draftsmanship and acumen in taking advantage of rules, it will insist that the courts at every stage shall be independent of form, shall amend where necessary, shall not be shackled by antiquated or even modern rules which would prevent full justice being done to all.

I have often quoted the remark of the late Goldwin Smith: "It is as reasonable to expect the tiger to abolish the jungle as the lawyer to reform legal procedure." Even a professor of history may not be wholly cognizant of the history of legal procedure; and certainly that statement shows lamentable ignorance of the facts, historical and otherwise, of legal reform. The tiger has never abolished the jungle, but the law has always been reformed by the lawyer. Whether the law is considered as adjective or substantive, that has always been so, both in England and on this continent. It must continue to be so, or

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hours more in an American city. In this city a court began to empanel a jury in a murder case upon the same day on which I opened my court. I had tried four criminal cases and seven civil cases and was home in Toronto before my American brother had six jurymen in his murder case.



reform will stop; for the leadership of the lawyer in all such matters is firmly established. He knows the defects, and can best devise the remedy. No call of public duty can be more insistent than the call to make and keep the courts as useful as possible. It cannot be denied that in some jurisdictions the courts do not in all cases do all that is expected of them; that efficiency methods seem not adapted to them; that they fail in doing justice in many instances; that, in more, the cost is utterly disproportionate to the good effected; that the practice is unwieldy and offers to the astute, means of escaping the just result of his acts.

Sometimes the hands of the court are tied. A legislature which allows the doctor to practise in his own way (*sub modo*) prevents the lawyer from doing the same, and will not even permit the expert lawyer of the judiciary to lay down the rules. Why the court should not, within reason, have the power to prescribe its own practice I cannot conceive, unless it be that the judges are not trusted or are not believed to know more about the needs of their court than the legislator.

Defects there must be in everything human—*errare humanum est*—defects in the judge, defects in the practice, defects in the practitioner; but these may be minimized. Where the judge is elected, it is the lawyer who decides who shall be the candidate. An honest and capable bar will not tolerate any but an honest and a capable bench. Honest and capable judges will see to it that a reasonable practice is prescribed if they have that power, and if they have no power to prescribe or alter, they will see to it that the existing practice is reasonably interpreted. But yet I must qualify these statements a little—"nature is subdued to what it works in, like the dyer's hand." A judge, however honest and however capable, is prone to stand by the old ways—*stare super vias antiquas*—and to change as little as possible. It is hard for anyone to learn that the art on which he has spent many a diligent hour is worse than useless.<sup>20</sup> Moreover, a judge is necessarily conservative *ex officio*. In not a few cases, honest and capable judges have by that very conservatism rendered, if not nugatory, at least less useful, changes which have been prescribed. The poet sings:

"For forms of government let fools contest,  
"That which is best administered is best."

He does not, I presume, expect his readers to accept that maxim literally; at all events they will not. An American could not become monarchist or a Canadian, democratic as he is, become republican. Still, there is much truth in it. So, too, in the administration of the

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<sup>20</sup> The lament of the bankruptcy lawyer is well known—on the repeal of a Bankruptcy Act he wailed, "Congress has abolished all I ever knew."



law, there is no little importance to be attached to the idiosyncracies of the judge. Some can make an almost villainous practice quite tolerable; others a tolerable practice almost villainous—and all equally honest and capable. All desire to do justice according to law, but some lay the emphasis on law, as others on justice. Therefore I add, it is not enough that a judge shall be learned, honest and capable; he must have a passion for justice irrespective of formality.

It is for the bar to see to it that such judges are selected and to support them in all reasonable efforts towards real justice. The lawyer is a member of a liberal and a learned profession. He must indeed do all for his client which the existing practice permits and the rules of honor do not prohibit; but nevertheless he must remember that he is a citizen of a free state, with an interest deep and abiding in its advancement; he must never forget that on this continent the lawyer is the leader in the thought of the people, that the common sense of the lawyer tends ever to become the common sense of the community. He should be in advance of his fellows; he must enlighten and attract; as he leads, the rest will soon follow.

# CONTRACTS FOR THE BENEFIT OF THIRD PERSONS<sup>1</sup>

ARTHUR L. CORBIN

Professor of Law, Yale University

By the great weight of authority in the United States the same facts that operate to create contractual relations between the offeror and the acceptor may also operate to create rights in a third person.<sup>2</sup> It may be useful, therefore, to examine in detail the nature and limits of this doctrine and to classify and discuss the cases in distinct groups.

To many students and practitioners of the common law *privity of contract*<sup>3</sup> became a fetish. As such, it operated to deprive many a claimant of a remedy in cases where according to the *mores* of the time the claim was just. It has made many learned men believe that a *chose* in action *could not* be assigned. Even now, it is gravely asserted that a man cannot be made the debtor of another against his will. But the common law was gradually influenced by equity and by the law merchant, so that by assignment a debtor could become bound to pay a perfect stranger to himself, although until the legislature stepped in, the common-law courts characteristically made use of a fiction and pretended that they were not doing that which they really were doing.

## TRUST BENEFICIARIES

If without privity of contract, one may become *indebted* to another, the lack of privity is surely no reason for denying him a beneficial right. As usual, equity saw this long before the common law did.<sup>4</sup>

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<sup>1</sup> This article contains the substance of certain sections in an edition of Anson on *Contracts* to be published by the Oxford University Press. Some use has been made of the notes of Professor E. W. Huffcut in an earlier edition.

<sup>2</sup> See 13 C. J. 705, sec. 815, citing more than 350 cases; 6 R. C. L. 884, sec. 271; Wald's Pollock, *Contracts* (Williston's ed. 1906) 237-278.

<sup>3</sup> In order that *privity* of contract may exist, it seems to be necessary for A to say to B "I promise you." It requires the voluntary selection of each party by the other. See criticism of the term *privity* in 15 AM. LAW REV. 244-5. For recent adherence to the fetish, see 6 R. C. L. 885, sec. 271.

<sup>4</sup> Not alone in the cases of trustee and *cestui que trust* was this true. The court did not shrink from expanding the concept of a trust to cover the case of a contract beneficiary. See *Tomlinson v. Gill* (1756) Ambler, 330, before Hardwicke, L. C.; *Moore v. Darton* (1851) 4 DeG. & Sm. 517. See also *School District v. Livers* (1899) 147 Mo. 580; *Forbes v. Thorpe* (1911) 209 Mass. 570; *Grime v. Borden* (1896) 166 Mass. 198; *Nash v. Commonwealth* (1899) 174 Mass. 335.

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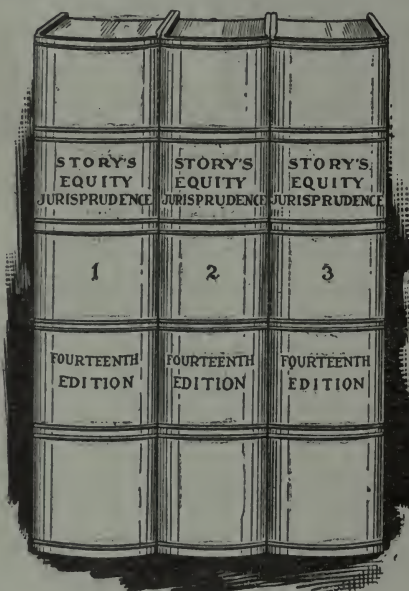
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forms part and declares its independence, is the rest of the world to look on idly and make no effort to get the questions adjusted on the basis of right? Probably at present it is better to leave the question unanswered, because future circumstances cannot be foreseen, and efforts must be made to deal with them when they arise. But one great advantage will have been gained;—there will be international machinery in existence, whether it will be possible to use it successfully or not.

Finally, there is the problem of the revision of treaties. There is a sense, though not that used by Treitschke, in which it is true to say that treaties are made on the basis of "*rebus sic stantibus*." As in the past so in the future, some nations will grow and others decline, and there will always be problems of access to the sea, colonization, and peoples under alien rule. For the moment the problem remains in the same position as that of interference in internal affairs, *viz.*, that it is impossible to say anything really relevant upon it. It must be left to the sphere of diplomatic negotiation, possibly assisted by the international machinery.

Modest as the suggestions of the League to Enforce Peace may appear to enthusiasts, it is certain that they are the most practicable that have yet been brought forward, and that they would afford the necessary foundation for "the slow and gradual process" by which the idea of public right will be enthroned as the governing idea in the politics of the world.

# CONSTITUTIONAL AMENDMENTS IN CANADA

WILLIAM RENWICK RIDDELL

Supreme Court of Ontario

[That this paper has been written at all is due to certain criticisms on my recent Dodge Lectures, at Yale University, on *The Constitution of Canada*—criticisms which seemed to indicate a want of acquaintance with our real Constitution; the paper is not written in any missionary spirit or to suggest superiority or even excellence in our institutions, but simply as a statement of fact.—W. R. R.]

To the student of political institutions there are few things more interesting than the differences between the systems of government of the two English-speaking peoples on the North American Continent. The people of the United States and those of Canada are largely of the same origin, the same language and the same religion; they have much the same ideals of liberty and justice; and their differences in government are therefore the more interesting.

## THE BRITISH NORTH AMERICA ACT

An intelligent foreigner who desired to understand the two systems of government would naturally be referred to the Constitution of the United States (and those of the several States) on the one hand and to the British North America Act, 1867, on the other.

The English-speaking peoples are not noted for their logical consistency in matters of politics nor do they trouble much over matters of form. If an institution works reasonably well they are content, however illogical it may be and whatever its form; though they ruthlessly abolish it, once it is proven by the event—not by argument—to be harmful.

The intelligent reader can obtain a fairly accurate view of the government of the American people from an examination of the Constitution alone. There will be some error—for example, as to the method of selecting the President. No doubt by the letter of the Constitution the people elect suitable persons who then select the best man they can for the Presidential chair. We know, of course, that this has been but a form for more than a century; that it is certain who will be selected when it is known who have been elected to select. In fact the Presidential Electors simply act as agents with authority to cast a vote for a person named, though in law they may select whom they please. The system works well enough; but let it once happen that the Electors did act in the manner apparently contemplated by the Constitution, and the Electoral College would probably disappear very soon.

In the British North America Act, however, no one could find anything like our actual government in Canada. It suggests a Governor-



General who governs the Dominion almost at will—selecting Ministers, Senators, Judges, calling together and dissolving Parliament at will, directing what fiscal measures the Parliament shall discuss, etc., etc., in true autocratic style—while every Canadian knows that the choice of Ministers is about as limited as the choice of Presidents and that the Governor-General has in most cases no more to do with calling together and dissolving Parliament than he has with the choice of Senators and Judges—and that is *nil*. Being a monarchical country we keep up the ancient monarchical forms—they work all right when used in the democratic spirit, and we are content.

Perhaps in nothing is the British North America Act more misleading than in its general form. It purports to be a gift by the Imperial Parliament, an expression of the will and the power of the Imperial Parliament at Westminster in the language of that Parliament. In law that is perfectly accurate—it is as true now as in Blackstone's time that in "the British Parliament . . . the legislative and . . . the supreme and absolute authority is vested by our constitution" and "our American plantations . . . are subject . . . to the control of Parliament."

The real transaction, however, was quite different. Some of the British American Provinces, "Colonies," were in the seventh decade of the last century dissatisfied with the existing state of affairs. Canada (then consisting of what is now Ontario and Quebec) had trouble over the equal representation of Lower and Upper Canada in her Parliament; Nova Scotia, New Brunswick and Prince Edward Island had also their troubles; moreover, they wished closer connection with the upper Provinces by rail; then, too, there was some fear that the United States might visit on Britain's helpless offspring on this continent a vicarious punishment for the Mother Country's want of sympathy during the Civil War—as indeed the United States did in 1866 by its abrogation of the Elgin-Marcy Treaty of Reciprocity—and there were in all the Provinces other considerations of more or less weight which seemed to call for a change. At a meeting of delegates from the Maritime Provinces held at Charlottetown, September, 1864, delegates from Canada appeared; and a meeting of delegates from all the Provinces was arranged at Quebec for October.

Now all these "Colonies" had full responsible government and had possessed full control over their own affairs without intervention by the Home Administration for many years before this.<sup>1</sup> The object

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<sup>1</sup> A reviewer finds fault with me for saying that constitutional government, responsible government, was introduced into the Canadas in 1841: well, the Imperial Parliament thought they were conferring it—52 and 53 Hansard (3d Series); Canadians thought they had received it, and Dr. Todd says they had—*Parliamentary Government in British Colonies* (2d ed.) 73—I leave it at that. In the Maritime Provinces it began in 1848.

of the Quebec Conference was not to obtain a greater measure of self-government but to arrange a union between the Provinces. A full discussion took place and certain Resolutions were agreed upon as the basis of union. There never was any doubt as to the proper course to pursue to make these Resolutions binding in law—the paramount power of the Imperial Parliament must be appealed to.

An Act was prepared by Colonial statesmen to carry into effect the Resolutions which contained the agreement of the Provinces. The language contained was the language of Colonials and but one change was even suggested by the Home Government—Lord Stanley thought that the name "Kingdom of Canada" might offend the Republican susceptibilities of the United States, and the name "Dominion of Canada" was employed instead.

In the House of Lords at Westminster the Earl of Carnarvon in moving the second reading of the Bill said that the measure was founded on the Quebec Resolutions and "must be accepted as a treaty of union,"<sup>2</sup> "a compact between the Provinces,"<sup>3</sup> "the result of a compromise,"<sup>4</sup> a measure "resting upon the free consent of the various contracting parties."<sup>5</sup> In the Commons Charles Bowyer Adderley (afterwards Lord Norton), Under Secretary, said it was "a scheme of union which embodied almost literally and without modification the Resolutions adopted at Quebec in the year 1864;"<sup>6</sup> "a matter of most delicate treaty and compact between the Provinces . . . a matter of mutual concession and compromise"; and added "we have in fact to accept or reject the proposal which the Provinces have made."<sup>7</sup>

While every one recognized with Baillie-Cochrane (afterwards Lord Lamington) that this was "giving to Canada almost perfect independence,"<sup>8</sup> the only objection to the Bill arose from a doubt whether there was in fact free consent on the part of Nova Scotia.<sup>9</sup> Parliament considered that the Legislatures of the various Provinces truly represented the people, and declined to give effect to a somewhat numerously signed petition from Nova Scotia opposed to the expressed desire of the Legislature.<sup>10</sup> The trifling amendments made were concurred in by the Colonial delegates sent over to procure the passing of the Bill; and the Bill passed.

While, as Adderley said,<sup>11</sup> the "most striking feature [of the Bill] is

<sup>2</sup> 185 Hansard (3d Series) 558.

<sup>3</sup> *Ibid.*, 567.

<sup>4</sup> *Ibid.*, 582.

<sup>5</sup> *Ibid.*, 571.

<sup>6</sup> *Ibid.*, 1165.

<sup>7</sup> *Ibid.*, 1169.

<sup>8</sup> *Ibid.*, 1193.

<sup>9</sup> *Ibid.*, 571, 589, 804, 1011, 1182, 1195.

<sup>10</sup> *Ibid.*, 580, 1019, 1020, 1183, 1188.

<sup>11</sup> *Ibid.*, 1169.



its scrupulous adherence as far as the circumstances of the case would permit to the constitutional features" of the Mother Country, it should always be borne in mind that the Act is in fact a "compact," a "treaty" put into a legally binding form. This compact made between the original Provinces, Canada (now become the two Provinces of Ontario and Quebec), Nova Scotia and New Brunswick, was necessarily concurred and participated in by the other Provinces as they came in.

The agreement was the result of many compromises all carefully thought out and made after full consideration: but no one thought that it was necessarily final. It is not unlikely that some provision would have been made for amendments in the Act itself but for Lower Canada. Lower Canada had a population predominantly French by descent and language, Roman Catholic in religion, with laws (outside of the criminal law) based upon the Civil Law; the other Provinces were predominantly English, Scottish, Irish, by descent, of English speech, largely Protestant, and with laws based on the Common Law of England. From the time of the Conquest of Canada in 1759-60, there had been expressed from time to time a desire on the part of some to treat the French Canadians as a conquered people and gradually to bring about an English population—a Legislative Union of Upper and Lower Canada was favoured for this purpose by Lord Durham in his Report (pp. 226, 227)—and there was always a dread, more or less openly expressed, that the laws, language and institutions of French Canada would be submerged. The French Canadians were not content to leave in the hands of their English-speaking fellow Canadians the power to do this by amending the Constitution agreed upon—they would not be willing to give such power to-day.

No such method could be adopted as in the United States; in a substantially homogeneous people like that of the original States, three-fourths might be expected not to pass any amendment which was not for the common good; but three-fourths of Canada was non-French and therefore not in sympathy with the peculiar institutions of Lower Canada.

The matter of amendment was left at large: no amendment could be made to the British North America Act except by the authority which passed it. But it never was anticipated that no amendment would ever be needed—the Delegates were practical politicians of long experience. No one feared that the Imperial Parliament would refuse an Amendment desired by a practically unanimous Canada; and no one feared that the Imperial Parliament would make any Amendment which was not desired by a practically unanimous Canada—French Canadians had and have the same implicit faith in the justice of the Home Parliament as English Canadians. All parties recognized that as the Act was a compact, it would naturally follow that no change



should be made in this compact without the consent of all the contracting parties; and it would equally follow that any and every change should be made if all the contracting parties desired it. Logically it might seem that a desire for an Amendment should be made to appear by the Legislatures of the Provinces; but that was impossible—the Legislature of Canada went out of existence and has no successor; the former “Canada” was divided into two Provinces, Ontario and Quebec, each with its own Legislature and neither the successor of the former Legislature of Canada. Moreover, the Provinces of the Dominion and their Legislatures have not the same jurisdiction as the former Provinces and their Legislatures.

The practice adopted is for the two Houses of the Parliament of Canada to present a petition to the King setting out the precise Amendment desired; on this Petition reaching the Home Administration, a Bill is prepared and passed through the Parliament in the exact words desired by Canada.

There never has been any attempt, any suggestion, to amend the Act except on such a Petition; there never has been a Petition which was not acceded to by the passing of the proposed Amendment. Any other course would be unthinkable—as unthinkable as that the Presidential Electors at the recent election should have ignored Wilson and Hughes and have unanimously elected Roosevelt. Britain is not the Britain of 1776; she quite recognizes that those of our race have the will as they have the right to govern themselves, whether for good or ill.

What may be considered by some an exception to the general statement is to be found in three Acts. In 1869, 1870 and 1873 Canada desired to borrow money on the guaranty of the Imperial Treasury so as to get the money cheaper—the money was required to pay off the Hudson's Bay Company, and to build fortifications and railroads. The Imperial Parliament authorized the Treasury to guarantee the loans on condition that Canada secured the Treasury by a charge on the Consolidated Revenue Fund; if this guaranty should be given, the Acts provided that Canada should not pass any valid legislation destroying the priority of the charge of the Treasury.

In our system there is no constitutional limitation prohibiting confiscation. The Parliament of Canada or the Legislature of a Province can legally confiscate without compensation in any case within the ambit of their jurisdiction. There is not the slightest doubt of the power of the Dominion to pass valid legislation giving or taking away priority of charges upon the Consolidated Revenue Fund. These Imperial Acts, then, modified the Constitution in the one particular—but there was nothing to compel Canada to accept the guaranty; and the provision as to Canada not impairing the priority of the charge was simply a term in the contract made between her and the Old Land

and assented to by her.<sup>12</sup> These Statutes were (1869) 32-33 Vic. ch. 101; (1870) 33-34 Vic. ch. 82; (1873) 36-37 Vic. ch. 45.

There have been two Imperial Statutes giving power to take in additional territory (the immense Hudson's Bay Territory),<sup>13</sup> and settling boundaries<sup>14</sup>; three validating Acts of doubtful validity passed by the Dominion Parliament;<sup>15</sup> one increasing the number of Senators from the Western Provinces;<sup>16</sup> and one extending the life of the existing Parliament for one year.<sup>17</sup>

On moving in the Canadian House of Commons the Petition for this last, the Prime Minister, Sir Robert Borden, said: "I entirely admit that no extension should be asked unless it appears to have the support of public opinion and unless it is approved by both political

<sup>12</sup> That Canada had the power to do as she pleased is manifested in a speech in the Commons at Westminster, July 8, 1869, by Sinclair Aytoun, when complaining of the Finance Minister of the Dominion employing a loan by the Imperial Government in contravention of the Canada Loan Act, 1867. He did not call in question Mr. Rose's conduct, because Canada was virtually an independent country and Mr. Rose was responsible only to the Parliament of Canada. 197 Hansard (3d Series) 1446.

<sup>13</sup> (1868) 31-32 Vic. ch. 105; 193 Hansard (3d Series) 998, 1001.

<sup>14</sup> (1889) 52-53 Vic. ch. 28. The Quebec Act of (1774) 14 Geo. III. ch. 85 (Imp.) extended the boundaries of the existing Province of Quebec (formed by the Royal Proclamation of October, 1763) so that its southern boundary ran along the Ohio River to its embouchure in the Mississippi; then the boundary ran "northward" from this point. When the Province of Quebec was divided into two Provinces in 1791, Upper Canada had all the territory west of a certain defined line in the former Province of Quebec. When the Dominion bought out the Hudson Bay Company, it first formed a new Province, Manitoba, and afterwards a Territory of Keewatin; to Keewatin it gave as its eastern boundary the western boundary of Ontario. Ontario had succeeded to the territory formerly that of Upper Canada. The question then was raised where was the western boundary of Ontario, and the answer to that question must be found in the interpretation of the word "northward" in the Quebec Act. The Dominion claimed that "northward" meant due north; Ontario, that it meant in a northerly direction along the Mississippi. An arbitration decided that the latter was the correct interpretation; but the Dominion would not accept the award. The question was then left to the Judicial Committee of the Privy Council, who agreed with the Arbitrators and recommended legislation (whether necessary or not) as advisable. The Canadian Parliament unanimously passed an address and Petition asking for such legislation—the terms of the Petition had been agreed upon by Dominion and Province. 28 *Canadian Commons Debates* (1889) 1329, 1363, 1423. The Bill passed without opposition and without debate. 338 Hansard, 514, 515, 835, 1068, 1685, 1790. The Act is (1889) 52-53 Vic. ch. 28 and the petition is printed as a Schedule to it.

<sup>16</sup> (1871) 34-35 Vic. ch. 28; (1895) 59 Vic. ch. 3 (these also expressly conferred the power for the future); (1889) 52-53 Vic. ch. 28.

<sup>16</sup> (1915) 5-6 Geo. V. ch. 45.

<sup>17</sup> (1916) 6-7 Geo. V. ch. 19.



parties"; the Leader of the Opposition said: "the British Parliament . . . will never under any circumstances alter the Constitution of this Country except upon a unanimous resolution of the two branches of the Canadian Parliament."<sup>18</sup>

When it was desired to extend the life of Parliament for another year the Prime Minister said expressly that the proposition would be dropped unless the resolution was carried by a unanimous or a practically unanimous vote; the vote was 82 to 62 and the matter dropped.<sup>19</sup>

Whether in the abstract it would have been better that the British North America Act should give the power to amend the Constitution by a three-fourths vote or some other vote, may be a matter of opinion, perhaps of sentiment: all discussions of such a question would be academic—the French Canadians would not have entered into such a contract, and it takes two to make a bargain. Equally futile would have been the suggestion that an amendment thereto be made by the vote of three-fourths or any number less than the whole of the Provinces. In politics as in everything else you cannot get away from geography and history.

#### PROVINCIAL CONSTITUTIONS

The part of the population of Canada which prevented it from being substantially homogeneous in the original Confederation was collected in the one place, Lower Canada, which was to be made a separate Province—there could be no objection to allowing each Province to amend its Constitution in any way consistent with the existence and permanency of the Dominion.

The Earl of Carnarvon on the second reading of the Bill in the House of Lords, February 19, 1867, said: "Whilst the provisions regulating the constitution of the central Parliament are in the nature of permanent enactments, those which govern the Local Legislatures will be subject to amendment by these bodies";<sup>20</sup> and in Committee: " . . . one of the principles upon which the Bill was based—namely that the local Legislatures should have the power of amending their own constitution."<sup>21</sup>

Naturally this power could not be absolute: as the power of the States of the Union could not be absolute.

The very first thing agreed upon was a federal union under the Crown of Great Britain and Ireland—the continuance of a monarchical form of government, just as in the United States the essence of the Union was a republican form of government. As the United States guarantees to every State in the Union a republican form of

<sup>18</sup> *Canadian House of Commons Debates* (1916) 629, 632, 634.

<sup>19</sup> *Ibid.* (1917), 3557, 3558, 3593.

<sup>20</sup> 185 Hansard (3d Series) 562.

<sup>21</sup> *Ibid.*, 805.



government, so it was intended that the Provinces should be guaranteed a monarchical form. The representative of the King in the Province is the Lieutenant-Governor, appointed for that purpose by the Dominion Administration: and the Legislatures consist of the Lieutenant-Governor and one or two Houses. The British North America Act by Section 92 (1) gives full and exclusive power to the Legislature in every Province in relation to "The Amendment from time to time notwithstanding anything in this Act, of the Constitution of the Province except as regards the office of Lieutenant-Governor."

It will be observed that this is Representative Government carried to its logical conclusion—when the voters elect Representatives, the power is in the Representatives without further reference to the people.

Under this section the Amendments have been many: only a few will be mentioned here.

While Ontario from the first had only one House in her Legislature,<sup>22</sup> the other three Provinces, Quebec, Nova Scotia and New Brunswick, had two.<sup>23</sup> Nova Scotia and Quebec still retain their two Chambers: but New Brunswick got rid of her Second Chamber, the Legislative Council, by the Act (1891) 54 Vic. ch. 9 (N. B.) passed April 16, 1891, which abolished it on the dissolution of the existing Legislature; the Legislature in 1893 had only the one House, the Legislative Assembly.

The Province of Manitoba was formed by the Dominion Statute (1870) 33 Vic. ch. 3 (Dom.), the validity of which was placed beyond doubt by the Imperial Act (1871) 34 Vic. ch. 28 (Imp.) The Canadian Act framed a Legislature for the new Province composed of the Lieutenant-Governor and two Houses, the Legislative Council and the Legislative Assembly:<sup>24</sup> the Manitoba Legislature abolished the Council by the Act (1876) 39 Vic. ch. 28 (Man.).

Prince Edward Island, which refused to come into the original union, was admitted in 1873 under powers granted by Section 146 of the B. N. A. She at that time had two Houses both elective: in 1893 these were dissolved by the Act 56 Vic. ch. 1 (P. E. I.), and a single House provided for, composed of fifteen Councillors and fifteen Assemblymen elected by voters of different franchises but sitting and voting together.

The other Provinces either came in—British Columbia— or were created—Saskatchewan and Alberta— with a single House.

Saskatchewan in 1917 by its Statute 7 Geo. IV, ch. 4 (Sask.) provided for representation by three members in its next Legislature of "persons of whatever age and of either sex who at the time of the . . . election are serving in any capacity in the expeditionary forces

<sup>22</sup> Sec. 69.

<sup>23</sup> Secs. 71, 88.

<sup>24</sup> Sec. 9.

of Canada or in any branch of His Majesty's Imperial Forces in Great Britain, France or Belgium" who had been resident in the Province for three months before joining—one member for those in Great Britain and two for those in France and Belgium, every candidate to have actually served six months.

Alberta did better: that Province by the Act (1917) 7 Geo. V. ch. 12 (Alberta) provided for two members representing the soldiers and nurses in Great Britain, France or Belgium: but also by ch. 38 enacted that twelve named Members of the House should be Members of the next House without election for their existing Ridings—they having enlisted for overseas service and being under military control.

But Ontario went even further—by the Act of (1918) 8 Geo. V. ch. 4 the life of the existing Legislature is extended until a year after the close of the war. The life of an Ontario Legislature is fixed at four years by the British North America Act, sec. 85, but no one has any doubt that any Legislature can extend its own life indefinitely, or shorten it. It was not thought wise to distract the Province with an election during war times and the Leaders of the two parties agreed to an Act extending the life of the present Legislature till a year after the war. Only one voice was raised against this measure, and that not on the ground that there was no power in the Legislature but that such a measure was unconstitutional in our (not the American) sense of the term.

The most serious difficulty an American meets in fully comprehending the Constitution of Canada is due to the fact that the Constitution of the United States and of the several States is in writing: and where there is any question of the meaning of these Constitutions, the Courts are appealed to for an interpretation. In Canada as in England most of the Constitution is unwritten: and while the British North America Act, 1867, may be called a written Constitution of Canada, no one can gather from it a correct idea as to the real government of Canada. It has often been pointed out that the word "Constitution" itself has a different connotation in American and in English (and therefore Canadian) usage. "In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be concerned: in American usage, the Constitution is a written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong, however legal it may be: with the American anything which is unconstitutional is illegal. With us to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."<sup>25</sup>

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<sup>25</sup> *The Constitution of Canada* (Dodge Lectures, Yale University) 52.



The solitary recalcitrant in the Ontario House did not contend that the House could not extend its own life, but that it should not—that such a measure was contrary to the principles of British and therefore of Canadian Government.

It is true that the instances of such an extension by Parliament in the Mother Country are few. Leaving aside as wholly anomalous the Long Parliament, the first instance is the well known Septennial Bill in 1715 during the troublous times following the Pretender's invasion; the Parliament elected under (1694) 6 W. & M. ch. 2, for three years by the Statute 1 Geo. 1 St. 2 ch. 38, extended its life to seven years. Whether this was constitutional in the English sense of the word is still a matter of controversy—that it was constitutional in the American sense of the word is not doubted by anyone. The existing Parliament of Great Britain and Ireland has extended its life several times: the Parliament of New Zealand also has extended its life by Statute. Whether these are constitutional, depends on the view taken of the exigency which occasioned them.

In Newfoundland (which of course is not a part of Canada) the Legislature by a recent Statute restricted the power of the Legislative Council without wholly abolishing it; its consent is unnecessary in money bills, the Speaker of the Assembly to determine what are money bills; and any other public bill which passes the Assembly in three successive Sessions becomes law notwithstanding rejection by the Council. This Act is of course based upon and is similar in its provisions to the well known Imperial Act (1911) 1, 2 Geo. V. ch. 13 (Imp.) which drew the teeth of the House of Lords.

In Canada there is, however, a certain check upon improper legislation by the Provinces: by sections 56 and 90 of the British North American Act, the Governor-General, *i. e.*, in practice, the Ottawa Administration, may disallow any Provincial Act within one year of its receipt at Ottawa. This power was rather freely used during the early years of Confederation; but the "constitutional practice" now settled is not to interfere unless the Act seems *ultra vires*. Nevertheless the legal power still remains and may be exercised at any time and in any emergency calling for such a proceeding.

The corresponding power given by section 56 to His Majesty in respect of Dominion legislation has been exercised only once and that at the implied invitation of the Canadian Administration.



# MORATORY LEGISLATION RELATING TO BILLS AND NOTES AND THE CONFLICT OF LAWS<sup>1</sup>

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In Roman law a debtor might obtain through a rescript of the emperor an extension of time (moratorium) within which to pay a debt, upon giving security.<sup>2</sup> Following the example of the Roman law a number of the modern continental codes authorized the granting of a judicial moratorium under certain conditions. Such legislation existed also with respect to bills and notes.<sup>3</sup> In most of the countries such a power is no longer generally vested in the Courts.<sup>4</sup> In times of great emergency, however, it is conferred upon them for a limited period of time. The present world war has also given rise to legislation of this kind.

Emergency legislation of a different sort granting time to a debtor to pay has been passed in various countries as the result of wars, revolutions, floods and other conditions vitally affecting the economic situation of the country or a particular section thereof.<sup>5</sup> At times it has taken the form of a general moratorium which postpones all pay-

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<sup>1</sup> A bibliography of the special literature on moratory legislation and the conflict of laws will be found in Appendix D, *infra*.

<sup>2</sup> Code I, 19, 2, 4.

<sup>3</sup> 1 Pöhl, *Darstellung des gemeinen deutschen und des hamburgischen Handelsrechts*, 385. See also Bills of Exchange Act of Vienna of Sept. 10, 1717, art. 51 (1 Siegel,—*Corpus Juris Cambialis*, 1742, p. 118); Bills of Exchange Act of Silesia of 1738, art. 38, sec. 2 (Siegel, *op. cit.* 313); Bills of Exchange Act of Brunswick of August 1, 1715, art. 56 (Siegel, *op. cit.* 261); Allgemeine Landrecht of Prussia, I, tit. 16, sec. 356, which was changed by sec. 14, no. 4, of the Introductory Law to the Code of Civil Procedure (1 Förster-Eccius, *Theorie und Praxis des heutigen gemeinen preussischen Privatrechts*, sec. 91, no. 42).

<sup>4</sup> In Austria such power was taken from the courts through sec. 353 of the Allgemeine Gerichtsordnung, of May 1, 1781.

<sup>5</sup> Such legislation has been frequently passed on the continent before the present war, especially in Italy. Attention may be called to the following:

*Austria.* Decrees of 1848 and 1866 (mentioned by Fick, p. 11).

*France.* Decrees of 1830 and 1848. See Duvergier, *Collection complète des lois, décrets, etc.*, 1830, p. 155; 1848, pp. 61, 63, 72, 125, 134, 366.

*Germany.* See Prussian decree of 1854, made at the time of the destruction of the city of Memel by fire (mentioned by Swoboda in *Oesterreichische Gerichtszeitung*, 1870, p. 290) and the decree of 1870 with respect to Alsace-Lorraine (mentioned by Fick, *Ueber internationales Wechselrecht in Beziehung auf Fristbestimmungen, insbesondere die französischen Wechsel-Moratoriumsgesetze und Dekrete*, 11).

*Italy.* Decrees of 1848, 1849, 1859, 1866, 1870. See also the later decrees of

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## THE DUEL IN EARLY UPPER CANADA.

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WILLIAM RENWICK RIDDELL.<sup>1</sup>

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That part of British America which was to become Upper Canada was, before the termination of the American Revolutionary War, almost uninhabited. At the close of that War, a considerable immigration took place<sup>2</sup> of those who had taken the part of the Crown in that conflict, United Empire Loyalists as they were called, driven out with what they considered in justice and what was certainly cruelty by their quondam brethren.

These settlers brought with them their English law and their customs; and although in theory French Canadian law was in force till 1792, the practice was in many cases far different.

Along with other customs imported, was duelling; and this was not at all diminished by the circumstance that many of those placed in positions of authority, when in 1792 the Province was incorporated, were Englishmen who had come from across the Atlantic to make a new home in the wilds of Upper Canada.

The civil law of England was formally introduced into Upper Canada in 1792; the criminal law of England had always been in force in all Canada from the time of the Conquest in 1759-60.

By the law of England and therefore of Canada a deliberate duel was unlawful—as Blackstone sententiously puts it: “where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of God and man \*\*\* the law has justly fixed the crime and punishment of murder on them and on their

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<sup>1</sup>LL. D., F. R. Hist. Society and Justice of the Supreme Court of Ontario, Canada.

<sup>2</sup>Nearly all the immigrants settled near the banks of the international rivers—on the left bank of the St. Lawrence were three main nuclei, at what are now Cornwall, Brockville and Kingston, on the Niagara was Newark now Niagara-on-the-Lake. On the Detroit River the loyalist remained to a great extent, at Detroit until it passed out of British hands in 1796: then many, but by no means all, crossed the river.

seconds also."<sup>3</sup> And such was the law laid down by Sir Matthew Hale, "as correct, as learned and as humane a judge as ever graced a bench of justice."<sup>4</sup>

While this was undoubtedly the law, it was in our early days not applied very vigorously. There was the "unwritten law" that if the duel was fair in all respects, the survivor and the seconds should not be convicted. Accordingly, although the law was always laid down accurately by the presiding Judge, the Crown Counsel, if the duel was a fair one, never pressed for a conviction; and the jury knew what was expected of them.

There were three—or perhaps four—duels which made considerable noise in their day and are not yet quite forgotten.

In 1800, January 3, John White the first Attorney General of the Province, and John Small the Clerk of the Executive Council, met behind the Government Buildings,<sup>5</sup> in a grove on Palace (now Front) Street at the foot of what is now Berkeley Street, Toronto;<sup>6</sup> and White received a wound above the right hip which proved fatal in a very short time.

White was an English Barrister who, being appointed Attorney General of the new Province, came to Upper Canada with the first Chief Justice, Osgoode. He was elected member of the first House of Assembly, representing the Riding of Leeds and Frontenac, but was not re-elected. He was a diligent, painstaking official, but apparently was unable to keep out of trouble: e.g., in 1799, he had to apply to the Court of King's Bench for protection against Captain William Fitzgerald of the Queen's Rangers who had threatened him and challenged him to a duel.<sup>7</sup> But he was not always to be so fortunate; he spoke slightly of the wife of Major John Small, Clerk of the Executive Council; and, failing to withdraw his imputations, he was challenged and shot by Small.

Major Small was an Englishman from Cirencester who came to Canada as Clerk of the Crown and Pleas and Clerk of the Executive Council. He survived till 1832, filling his official position with much credit.

<sup>3</sup>Blackstone's Commentaries, Vol. IV, P. 199.

<sup>4</sup>Hale's Pleas of the Crown, Vol. 1, P. 452.

<sup>5</sup>These were the original Public Buildings, destroyed by the American troops in 1813. It was in retaliation for this and similar acts, of gratuitous vandalism that the American Capitol was destroyed (in part) by the British troops.

<sup>6</sup>The Streets running South toward the Bay at that time went to the edge of the water; it was not till the Grand Trunk Railway came through, in the 50's, that the Esplanade was constructed.

<sup>7</sup>This appears from the Manuscript Term Books of the Court of King's Bench (commencing in 1794) still preserved at Osgoode Hall, Toronto.

White was buried in his garden on his own lot in York (Toronto) east of Sherbourne Street and near Bloor Street. In 1871 his bones were turned up by laborers digging out building sand and were reverently deposited in St. James' Cemetery by Mr. Clarke Gamble, Q. C.

Small was the ancestor of the well-known and highly esteemed Toronto family of that name. He seems to have acted in all respects in the manner the rules of honor of his times demanded of a gentleman.

He was tried for murder, January 20th, 1800, at York (Toronto) before Mr. Justice Allcock and a jury; and the duel being a fair one he was promptly acquitted. The foreman of the jury was William Jarvis, father of Samuel Peters Jarvis whom we shall meet later on.

Early on the morning of October 10th, 1806, William Weekes and William Dickson, both prominent lawyers, met behind a bastion of old Fort Niagara on the American side, and Weekes received a pistol wound so severe that he died the same evening.

Weekes was an Irishman who late in the eighteenth century came to New York where he was a follower of the notorious Aaron Burr. Making his way to York, Upper Canada, he was called to the Bar in 1799<sup>8</sup> and at once obtained a good practice. He joined the well-known Judge, Thorpe,<sup>9</sup> in his opposition to the Government of the day and was elected a member of the House of Assembly. Mr. Justice Thorpe presiding at the Court of Assize and Nisi Prius at Niagara, (Newark) Weekes in an address as Counsel made a vicious attack on the Government without objection from the Bench—indeed it seems to have been expected by the Judge that such an inflammatory address would be made. Weekes was followed by Dickson who made as virulent an attack on Weekes as Weekes had made on the Government.<sup>10</sup> Nothing came of this for a few days, but one night spent by Weekes and the Judge together in a neighboring tavern seems to have developed a plan for the humiliation of Dickson. Weekes was a bachelor without encumbrances; Dickson had a wife and a large

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<sup>8</sup>Weekes was the first to be called to the Bar by the Law Society of Upper Canada, not having been in practice when the act creating the Law Society came in force.

<sup>9</sup>As to Mr. Justice Thorpe, see *The Journal of the American Inst. of Criminal Law and Criminology*, Vol. 4, P. 12, May 1913, where a fairly full account is given of him.

<sup>10</sup>Curiously enough Weekes and Dickson were great friends: in the early part of this year. March 5, 1806, Dickson was made a "Bencher" or Governor of the Law Society on the motion of Weekes. They were, moreover, of the same stripe of potatoes, Weekes being by far the more outspoken.



family of small children; he was moreover a canny Scot; and the conspirators thought he would decline a challenge. Accordingly a challenge was sent; and somewhat to Weekes' dismay it was promptly accepted, with the result we have seen.

Weekes was buried at Niagara. The administration of his very considerable estate was one of the scandals of that early time and was the occasion of one of the earliest private Acts in our Provincial history.

Dickson became a member of the Council and a man of considerable influence in public affairs; he is best known from the part he played in the prosecution—and persecution —of Gourlay.<sup>11</sup> Of course Dickson was not prosecuted for his part in the duel the crime (?) not being committed in Upper Canada.

The next duel probably caused more stir at the time and afterwards than any other similar event in our early history.

In 1815, Mr. Samuel Peters Jarvis went from York to Quebec with his youngest sister to place her in a Boarding School there. At the request of Mrs. Thomas Ridout her mother, he also took along Miss Ridout who was to be placed at the same school. On arriving at Quebec he called upon Miss Ridout's brother, Mr. Thomas G. Ridout, an officer in the Commissariat Department who took the young girls under his protection. Ridout was to pay Miss Jarvis' accounts and draw upon her brother for the amount.<sup>12</sup> The following year Mrs. Ridout visited Quebec, and through some misunderstanding got the idea that her son had been obliged to pay for Miss Jarvis' support without reimbursement by Jarvis. She told this to some people and it came to Jarvis' ears. Jarvis wrote to her husband, who was Surveyor General of the Province, demanding a contradiction of the story; he handed the letter to his son George (afterwards Treasurer of the Law Society) who at once wrote Jarvis, saying, "for any imaginary injury received from any part of my family, I am ready to answer". Jarvis demanded an apology or "meet me with your friend Saturday morning next seven o'clock at the Five Mile Meadow opposite Brown's Point". Ridout accepted "of the terms contained in the latter part of your letter if it be possible to reach

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<sup>11</sup>Robert (Fleming) Gourlay, the "Banished Briton" who was banished from Upper Canada in 1819 largely through the instrumentality of Dickson. His offense was in the main his criticism and defiance of the authorities, the proceedings though frequent attacked as improper and unlawful were in my judgment wholly regular and authorized by the Statute law, however unwise they may have been, and, *me justice*, were.

<sup>12</sup>These accounts, or some of them, are still preserved in the Public Library, Toronto, and form interesting reading.

the appointed place within the period limited." Accident prevented this duel; another meeting was arranged; but the Reverend Dr. Strachan (afterwards the first Anglican Bishop of Toronto), a friend of both parties, succeeded in bringing about an amicable settlement. On November 16, 1816, both signed a document whereby Jarvis withdrew the letter to the Surveyor General, the elder Ridout; and it was agreed that "a letter shall be immediately written to the Surveyor General requesting him to give complete contradiction to the reports circulated by Mrs. Ridout to the prejudice of Mr. Jarvis, which it is understood the Surveyor General is to give." This was done and the trouble blew over for the time.

The hard feelings between the families were not, however, abated. In the following year, John Ridout, a student in the Law Office of his brother George and not quite of age, was conducting a law suit against Jarvis' father, and Jarvis was trying to settle the action. On one occasion Jarvis ordered Ridout out of his office;<sup>13</sup> a few days thereafter the two met on the street; Ridout struck Jarvis several times with a stick and shattered the bones of his right hand. Jarvis knocked him down with a blow from his left and the fight continued until the parties were separated by Captain FitzGibbon<sup>14</sup> and Dr. Horne.<sup>15</sup> A few days after Mr. James E. Small<sup>16</sup> waited on Jarvis on behalf of Ridout. Jarvis promptly accepted the challenge, and at daylight next morning went with his second, Mr. Henry John Boulton<sup>17</sup> and met Ridout and his second, Small, at Chief Justice Elmsley's barn, not far from the north west corner of Yonge and College Streets, Toronto. Waiting at the barn until a shower was over, the principals were placed eight yards apart; it was agreed that the signal should

<sup>13</sup>Jarvis claimed that Ridout was unbearably offensive and even insulting—there was no third party present and we have not Ridout's side of the story. No one, however, doubted Jarvis' integrity and sense of honor.

<sup>14</sup>"One of the heroes of the war of 1812-14, an Irishman who died a "Poor Knight of Windsor". Many of his descendants still live in Canada.

<sup>15</sup>Robert Charles Horne, an Englishman and a Member of the Royal College of Surgeons, was an Army Surgeon in the War of 1812-14. When his regiment, the Glengarry Light Infantry, disbanded at the close of the war, he came to York (Toronto). It is not quite certain whether he engaged in general practice but he was made Surgeon to the North York Militia. He was appointed a member of the Upper Canada Medical Board to examine candidates for License to practice Medicine. At different times he was editor and publisher of the Upper Canada Gazette, Kings Printer and Cashier of the Bank of Upper Canada. A strong Tory his house was burned by the Radicals in the short lived Rebellion of 1837-8: He died in 1845.

<sup>16</sup>Son of Major John Small and afterwards Treasurer of the Law Society of Upper Canada.

<sup>17</sup>Afterwards Solicitor General of Upper Canada, and Chief Justice of Newfoundland. He was a son of Attorney General (afterward Mr. Justice) Boulton.



be "one, two, three, fire," but that on no account was either party to raise his pistol till the word "fire". Mr. Small pronounced "one," and was in the act of pronouncing "two" when Ridout raised his pistol and fired at Jarvis, he then left the ground in a direction away from Jarvis. Whether this was due to nervousness (as is likely) or not, Jarvis insisted to the end of his life that it was a deliberate attempt at foul play. Ridout was rebuked by his second and directed to take his place. He said: "Yes I will, but give me another pistol;" a loaded pistol was given him, but after a conference between the seconds, taken away later, as "Jarvis was entitled to his shot". The second pronounced the signal agreed upon and Jarvis fired, Ridout fell, was carried into Chief Justice Elmsley's barn and there died in a very short time. The pistols used on this occasion are in the possession of Aemilius Jarvis, Esq., of Toronto, grandson of the surviving principal. They are long and heavy, carry a large bullet, and are most deadly weapons.

Jarvis was arrested the same day and taken to prison, where he remained till the October Assizes at York.

He was arraigned at York before Chief Justice Powell,<sup>18</sup> the Attorney General, D'Arcy Boulton, receiving permission to retire from the case as his son had been concerned with the matter as second. The Solicitor General John Beverley Robinson was absent and the Judge himself examined the witnesses. The jury found a verdict of "not guilty" after a few minutes consideration, although the charge "was anything but indulgent to the prisoner and was so considered by most of the persons present in Court."

Small and Boulton who had been indicted as accessories were as a matter of course discharged on the verdict acquitting the principal being pronounced.

The unhappy mother whose unguarded words were the beginning of the troubles between the families—"the beginning of strife is as

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<sup>18</sup>William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England and in the Continent. He took part in the Siege of Boston on the Loyalist side but afterwards went to Highland and studied in the Middle Temple. He came to Canada in 1779, received a license to practise and did practise law in Montreal. Being created First Judge of the Court of Common Pleas for the District of Hesse he went to Detroit in 1789; when the Laws of King's Bench in Upper Canada was organized under the Statute of 1794, he was made the Senior Puisne Justice. He became Chief Justice in 1815 and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813.

Jarvis afterwards married his daughter Mary who had been engaged to the young Attorney General John McDownell who met a hero's death at the Battle of Queenston Heights in 1812.



when one letteth out water"—never forgave either principal or second for her son's death; for years she used to wait after the morning service at the door of St. James' Cathedral until Boulton came out and would then solemnly curse him for his part in what she called the murder of her son.<sup>19</sup>

This duel was recalled some years later. Francis Collins, an enthusiastic Irishman of strong Radical leanings, was conducting the "Canadian Freeman," a newspaper strongly opposed to the Government. Early in 1828, he made attacks on Henry John Boulton (now become Solicitor General) in connection with the duel in 1817 in which he had acted as second. A bill of indictment for libel was found against Collins for these publications and he was arrested. Appearing in Court before Mr. Justice Willis<sup>20</sup> he made a violent attack upon the Attorney General, John Beverley Robinson, for prosecuting him while he took no proceedings against Boulton for "a crime that the law of England calls murder, committed ten or eleven years ago." The Judge sent Collins before the Grand Jury, who speedily found a bill against Boulton and Small the two seconds; they were arrested but admitted to bail. Collins applied for Robert Baldwin<sup>21</sup> to conduct the prosecution, which he did.<sup>22</sup> The trial lasted two days and resulted in an acquittal, the jury being out only ten minutes.

The other duel which I propose to speak of was fought in 1833; it is often, but I think inaccurately,<sup>22½</sup> called the last duel in Upper Canada.<sup>23</sup>

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<sup>19</sup>*Ex relatione* Sir Glenhohne Falconbridge the present Chief Justice of the King's Bench.

<sup>20</sup>John Walpole Willis, son of the Dr. Willis, in whose care King George III was put when he was insane, was a justice of our Court of King's Bench. He fell foul of the Governor and was "removed" in 1828. Afterwards he became a Judge in Demerora and in New South Wales, from the latter position he was also removed and finally he demurred until 1877. See an Article "The Court of Kings Bench in Upper Canada, 1824-1827" by the present writer. *Canada Law Journal*, Pp. 126 (1913).

<sup>21</sup>The Honorable Robert Baldwin, an eminent lawyer, but still more eminent for his labors in the cause of responsible government in Upper Canada, the founder and exemplar of the "Baldwin Reformers."

<sup>22</sup>In those days no one could conduct a criminal prosecution but the Attorney General or Solicitor General who devised no small income from that source. Baldwin was specially retained under the circumstances of the case.

<sup>22½</sup>Since the text was written I have been informed by a gentleman, formerly a Postmaster General of Canada, that two medical men (whose names he gave me) fought a duel with pistols at Bend Head, in the County of York, Upper Canada, in the early 40's, or at least after 1837.

<sup>23</sup>While I can not lay my hand on any report, contemporary or otherwise, of a subsequent duel, it is quite certain that at least one of our public men enjoyed the

About the time of the Jarvis-Ridout duel, there came to the Township of North Sherbrooke (in Lanark County) a number of immigrants generally called the "Radical Settlers." One of them, poor but prominent and influential, was Ebenezer Wilson, who had been a mill-superintendent in Scotland. His oldest son by a second marriage was John Wilson born in Scotland 1809, and emigrating with his father.

Young Wilson, when teaching a small school, was brought to the attention of James Boulton,<sup>24</sup> a practising attorney in Perth, who took him into his house, allowing him to pay for his board, etc., by teaching Boulton's little child. He was admitted to the Law Society, Easter Term, 11 George IV, i.e. 1830; another Student Robert Lyon who had been admitted a year sooner, "Michaelmas Term, 10 George IV, 1829," was in the office of Mr. Thomas Maybee Radenhurst, also in practice in the same town.

Bytown<sup>25</sup> (now Ottawa), at that time was small but of growing importance and had a good deal of legal business. That part of the country had not yet been set off as a District and all the Courts were held at Perth; the Perth lawyers mentioned had branch offices in Bytown and occasionally sent their older clerks to attend to them.

The two young men were together in Bytown in 1833, when one day Lyon spoke disparagingly of a young lady of most estimable qualities and high character who was a member of the household of a Mr. Ackland in Perth. Wilson informed Mr. Ackland of this statement in a letter; he mentioned it to several persons and it came at length to the ears of another young lady of whom Lyon was *epri*s. This young lady on his return to Perth, treated Lyon coolly, and at length told him of what she had heard. Lyon met Wilson, demanded an explanation, and as Wilson was explaining Lyon knocked him down, calling him a lying scoundrel. On the advice of his friends and much against his own inclination, Wilson challenged Lyon. Wilson's second was Simon F. Robertson another law student and a fellow

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reputation of having fought several duels later than this. It is more or less common report that duelling continued till about the 50's.

Many myths have arisen about the Wilson-Lyon duel; the present account is largely derived from the Chief Justice's notes (still preserved at Osgood Hall), of the trial of Wilson and Robertson, has secured for murder.

Several other sources of unquestionable reliability have been made use of, and it is believed that the accuracy of the account here given, can be depended on.

<sup>24</sup>Boulton was a man of some prominence in the profession; he afterwards removed from Perth to Niagara, where he practiced for some time. He got into financial difficulties and treating client's money as his own, was struck off the rolls.

<sup>25</sup>Called after Colonel By, the British Engineer, who built the Rideau Canal from Ottawa to Kingston.

student of Lyon's (admitted Trinity Term 1 and 2 Wm. IV, 1831) and Lyon's second was a relative of his, Henry Le Lievre.

On the following day, the 13th June, 1833, the parties met in a ploughed field on the right bank of the River Tay under a large elm tree and a few feet beyond the dividing line of the Districts. It was raining hard and both missed on the first fire (though Lyon was said to be a crack shot); and Wilson was ready, indeed anxious, to allow the matter then to rest. Le Lievre, however, insisted on another shot. On the second exchange of shots Lyon fell mortally wounded and died in a few minutes on the ground. Le Lievre fled but Wilson and Robertson gave themselves up.

Le Lievre was much the eldest of the party, Lyon was not twenty and Wilson and Robertson but a few years older.

The duel had been fought in the Johnstown District, though all parties resided in the Bathurst District; the two young men were accordingly tried at the ensuing assizes at Brockville on Friday August 9th, 1833. At that time and until 1841 those accused of felony were not allowed to defend by Counsel; the young law students defended themselves and were acquitted.

The presiding Judge was Chief Justice Robinson, whose note book is preserved at Osgoode Hall. It is noteworthy that it was proposed to ask the first juror whether he had expressed or did entertain opinions unfavorable to the prisoners. The question was not allowed; our law does not permit such practice. It is very rarely that in our Court it is even suggested, though the proceeding is very common, indeed almost universal, in many of the States of the Union. In my own experience of over thirty years I heard such a question only once and that by a very young barrister who never did it again.<sup>26</sup>

The proceedings at the trial are a perfect example of the course taken in such cases; the presiding Judge allowing a mass of testimony to be given explaining the circumstances out of which the duel had arisen, what was said and done by each party, etc. etc., everything

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<sup>26</sup>The proper practice is to challenge for cause and prove prejudice, *aliunde*. See *R. v. Peter Cook*, 13 St. Tr. 334; *R. v. Edmonds* (1821), 4 B. & Ald., 471, 492.

The case referred to was *The Queen v. Mrs. Bell*, at the Ottawa Assizes, before Mr. Justice Robertson. I was of Counsel for the Crown and upon the prisoner's counsel desiring to examine the jurymen, I stated to the Court that although the practice was wholly irregular, yet in view of the great newspaper notoriety the case had received and the atrocious character of the crimes charged, I would not object. Mr. Justice Robertson, with great reluctance yielded to the request, upon this consent. No jurymen was rejected; the prisoner was convicted and sent to the penitentiary for life. The length of time many American Courts consume in obtaining a jury is a standing marvel to Canadians. I have never seen it take more than half an hour with us.



which would show the prisoner did not wantonly seek a duel; although he carefully notes (and no doubt said at the time) that "it is not evidence."

At the trial it was proved that Wilson detested duelling but that on being knocked down by the taller, heavier and more powerful Lyon, he felt himself bound to send a challenge in order "to maintain his standing in Society." His master, James Boulton testified that Wilson was very sensitive as to what was thought to be "his humble origin"—he was the son of a poor farmer—that consequently he "felt it the more necessary to be tenacious of his character and scrupulous about preserving it from taint \* \* \* than if he had been of a higher walk, he would have risked all this and treated it with contempt." Several witnesses swore that, had he not challenged, he would have been exposed to be contemptuously treated by his young companions and other—which gives us a vivid view of Society at that time. It seems to have been arranged that Wilson should "explain away the effect of his letter" and Lyon should apologize, but that Lyon subsequently refused to implement this agreement.

It is impossible not to recognize from the evidence that Le Lievre was the real author of the mischief. He had been very attentive to the maligned young lady<sup>27</sup>, but she had given him his congé and received the addresses of Wilson. When Lyon received the challenge, he stated that he had said what he had to Wilson only to tease him and

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<sup>27</sup>She was Miss Elizabeth Hughes, the daughter of the Reverend David H. Hughes, a Unitarian Minister, at one time head master of a classical and mathematical School at Kingsbridge, Devon, England, and afterwards pastor in charge of Vicarage, St. Chapel, Yeovil, Somerset. He came with his children, Elizabeth and David John to Canada in 1832, and died of cholera at Coteau, on his way to the Perth settlement. Mr. Gideon Ackland with whom the Hughes family were acquainted, and whose wife kept a school in Perth, took the orphans into his home in that town. Ackland was then a law-student (having entered the Law Society, Mch. Term, 2 Wia. IV, 1831), he was admitted an Attorney June 27, 1836, and called to the Bar June 14, 1837; he practiced in St. Thomas. Miss Hughes became a teacher in Mrs. Ackland's School, in Perth. The boy, who was only twelve, was adopted by Ackland, and after working for a time as "Printer's Devil" he studied law under Wilson (then became his brother-in-law). Was admitted and called August 2, 1842. After a successful practice he became judge of the County Court, of the County of Elgin at St. Thomas, in 1853: retiring in 1903, after half a century of faithful service, he lived in honor until this present month, dying April 14, 1915. According to the recollection reduced to writing some years ago, of Mr. Cromwell, a member in 1833, of the household of Ebenger Wilson, John Wilson was engaged to another young lady; however that may be, he afterward married Elizabeth Hughes, and she survived him, dying in Toronto, February 12, 1904. She treasured to the last resentment against Lyon, her traducer. I have been informed that meeting a gentleman of that name and family on the street car in Toronto toward the end of her life, she could not conceal her embittered feelings.

had not supposed that he would take it seriously. He had asked a Mr. Muir to act as his second but Muir refused and he took Le Lievre; then the meeting being postponed until the evening, Lyon refused to carry out the arrangement which had been made, and the parties met about six p. m.

After the first exchange of shots, Dr. Hamilton went forward to the seconds and desired to bring about a reconciliation. Le Lievre at once said a reconciliation was impossible.<sup>28</sup> Dr. Hamilton then desired to speak with Lyon, but Le Lievre said he could not until the pistols were loaded. Notwithstanding this, he spoke to both principals. Wilson seemed very desirous of settling, but Lyon said it was impossible.

The Chief Justice has written out his charge which to a lawyer at least is of extraordinary interest. He begins with the serious nature of the duty of Judge and Jury and warns the jury against being led away by their feelings. He then defines with perfect legal accuracy the nature of the offence charged and the criminality of the duel, but he inserts the significant sentences: "The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair,<sup>29</sup> yielding to the practices of Society \* \* \* that sometimes no one being present the fact could not be proved at whose hands the party fell, \* \* \* at other (times) they may have felt it difficult to infer

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<sup>28</sup>While it is reasonably certain that the fatal result of this duel was due to Le Lievre, he acted *secundum artem*.

In the Code settled by the Gentlemen Delegates of Tipperary, Galway, Mayo, Sligo and Roscommon at the Clonmell Summer Assizes, 1775, generally agreed to and followed throughout Ireland and in substance elsewhere. Rule 5 reads as follows:

"As a blow is strictly prohibited under any circumstances amongst gentlemen, no verbal apology can be received for such an insult: the alternators therefore are—first the offender handing a cane to the injured party, to be used on his own person, at the same time begging pardon; second, firing on until one or both are disabled; or thirdly, exchanging three shots, and then asking pardon, without the proffer of the cane."

If you had not, of course, taken the first alternative and the firing must necessarily proceed, if the Code was to be adhered to.

See "Personal Sketches of His Own Times," by Sir Jonah Barrington, 1830, Vol. II, pp. 16, 17.

<sup>29</sup>This reminds one of the charge of Chief Justice Fletcher of the Court of Common Pleas of Ireland, when in the second decade of the 19th Century, he presided over the trial of one Fenton for the murder of Major Hillas, whom he had killed in a duel: "Gentlemen, it is my business to lay down the law to you, and I will. The law says the killing a man in a duel is murder, and I am bound to tell you it is murder; therefore in the discharge of my duty, I tell you so; but I tell you at the same time, a fairer duel than this I never heard of in the whole *course* of my life."

that malice aforethought essential to murder." He deals with the facts of the duel and then with the antecedent facts "not as legal evidence but as the only palliative the Prisoners could offer and was usually heard." After congratulating the prisoners on being "so capable of defending themselves" when they were prevented by law from addressing the jury by counsel, he adds, "Wilson was of humble origin and saw his prospects blasted if he submitted to the degradation and was impelled by the usages of Society and the slights he had partially felt or foresaw to adopt the only alternative which men of honour thought open to him \* \* \* he to the last relied upon an amicable adjustment and went out determined not to fire at deceased and did so at last in a state of nervousness." It is no great wonder that the jury took the very broad hint and followed the example of other juries who, finding "all was fair," refused to convict. The Chief Justice notes that "the jury was but a short time in consultation."

Wilson subsequently married the young lady, who was amiable and accomplished; not the faintest suspicion was ever breathed against her except the jesting remark of young Lyon made to tease his comrade and not expected or intended to be taken seriously.

Wilson was called to the Bar in 1835 and was at once sent by Boulton to conduct a branch office in Niagara; but in a very short time he removed to London where he obtained a very large practice. After serving in the Rebellion as Captain of Militia he became a Member of the House of Assembly and afterwards in 1863 was elected to the Legislative Council. He did not take his seat in the Council as he was in that year appointed to the Bench of the Court of Common Pleas as a Puisne Justice. He survived until 1869, never it is said ceasing to deplore the unhappy fate of his boyhood's friend Lyon,<sup>30</sup> or his own part in it.

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<sup>30</sup>Lyon was of the prominent and well-known family of that name in Eastern Ontario. George Bryon Lyon Fellowes (a nephew) and the Judge Lyon of Ottawa, were relatives.

Robert Lyon was a cousin of the wife of his master. Mr. Thomas Maybee Radenhurst (called and admitted April 21, 1824), and lies buried in the Radenhurst plot in the old Anglican burying ground, at Perth, Ontario. A headstone placed there by his friends commemorates his fall "in mortal combat."



# Journal of

## the American Institute of

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## “JENKIN RATFORD, ORDINARY, BORN IN LONDON.”

WILLIAM RENWICK RIDDELL.<sup>1</sup>

An old dog's-eared, foxed and faded pamphlet<sup>2</sup> of thirty-two pages, published at Halifax, N. S., in 1807, contains a contemporary account of a transaction which created no little stir in its day and probably had at least some influence in bringing on the unfortunate and fratricidal war of 1812-1814.

His Majesty's Sloop, Halifax, was lying in Hampton Roads on Saturday 7th March, 1807; First Lieutenant Thomas Warren Carter of the Halifax, about 6 P. M. of that day sent the jolly-boat with Mr. Robert Turner, Midshipman, and five men, Richard Hubert, Henry Saunders, Jenkin Ratford, George North and William Hill to weigh a kedje-anchor which had been dropped for use in swinging the ship. They got hold of the kedje-hawser and had raised the anchor up to the bows, when it came on to rain very hard; the weather being thick, the men took advantage of the occasion to row the boat as quickly as possible towards shore, Sewell's Point. Turner hailed his ship repeatedly till silenced by Hill threatening to knock his brains out and throw him overboard. Volleys of musketry were shot off at them from the Halifax and some large guns were got ready, but unfortunately the jolly-boat had by this time got so far in the dusk that it was useless to fire; moreover a tender from the sister ship Bellona was immediately in her wake so that to fire would be dangerous.

On reaching Sewell's Point, all five men jumped out and left the midshipman; they then cut the painter and shoved off the boat, when Turner jumped into the water and waded ashore.

<sup>1</sup>LL. D., F. R. Hist. Soc., etc., Justice Supreme Court of Ontario.

THE  
TRIAL  
of  
JOHN WILSON alias JENKIN RATFORD  
for  
MUTINY, DESERTION and CONTEMPT  
to which are subjoined  
a few Cursory Remarks

HALIFAX

Printed by John Howe and Son.

The "Remarks" are dated Halifax, September 5, 1807.—W. R. R.



The next day two of the deserters were seen in Norfolk, one with an American flag, the other coming out of a public house—no unusual sight.

Information was sent to Lord James Townshend who was in command of the Halifax; he went himself to Norfolk and told the British Consul there. It was then found that the deserters had joined the American Ship of War, the Chesapeake: Townshend applied to Lieutenant Sinclair of that ship and was told that no such persons had been entered for his ship. Sinclair added that if any deserters had been entered, application must be made to the magistrates. Application was made in that quarter, but in vain; and Captain Decatur would do nothing. Townshend met Saunders and Ratford, and asked them why they did not return to the ship. Saunders said he would do so, but Ratford grabbed him by the arm and said with an oath that neither he nor any of the rest of the deserters would return. With a contemptuous gesture, he told Townshend that he was in the land of liberty, and immediately dragged Saunders away—to prove his assertion, I presume.

Another application to Lieutenant Sinclair was equally without result.

This kind of practice was very common along the American coast; and Admiral Berkeley in command of the Fleet of the North Atlantic issued an order to the ships under his command, June 1st, 1807, which set out that there had been desertions in the Chesapeake from H. M. SS. Belisle, Bellona, Triumph, Chichester, Halifax and Zenobia (Cutter), that the deserters had entered on the American ship Chesapeake and that the Magistrates and Recruiting Officers refused to give them up when demanded. He therefore ordered the Captains and Commanders of his fleet to stop the Chesapeake and showing this order, search her for deserters, permitting the American Commander to search their ships for deserters if desired.

On June 22nd, 1807, H. M. S. Leopard met the Chesapeake some fourteen miles from land off Chesapeake Bay, sent Admiral Berkeley's order on board her, and demanded to search for deserters. Commander Barron refused, the British Captain fired a shot across the Chesapeake's bows, and that not being effective, fired a broadside into her, killing some six men and wounding over thirty.

The Chesapeake lowered her colours; she was searched by British seamen and four deserters were found: Ratford was one of them; he was found hidden in the coal hole, taken on the quarter-deck and fully identified. He had been entered on the Chesapeake's books under the name of John Wilson, which he explained by saying

that Lieutenant Sinclair had asked him when entering the Chesapeake if he "had not a second name." He explained his presence in the coal hole by saying it was for fear the Americans would make him fight against his country "which he declared he would not do on any account." It would appear that Hubert, Saunders and North, who had also joined the Chesapeake (with changed names at Sinclair's suggestion), had deserted on the voyage between Norfolk and Washington.

Ratford was taken to Halifax and there upon the demand of Townshend he was, August 26th, tried by a Court Martial composed of Admiral Cochrane and six Captains, "all the Captains of the rank of Post" at the place. The above facts were fully established; and, notwithstanding the evidence of Townshend and Carter that he had before his desertion been quiet, steady, sober and attentive, he was sentenced to be hanged at the yard-arm of one of His Majesty's Ships at Halifax. On the following Monday morning, "at a quarter past nine o'clock, the sentence of the Court Martial was carried into effect at the fore-yard-arm of his Majesty's Sloop of War, Halifax."

At the Court Martial it was plainly made to appear that deserters from British ships of war were most shamelessly encouraged by the American recruiting officers, and that these officers in replies to demands for their return were almost uniformly evasive and prevaricating. This was notorious and has never been denied; even a distinguished American<sup>3</sup>—whose patriotism will not allow him to censure the appointment by the President, as an "impartial jurist of repute" of a gentleman who could be termed a jurist only by an extreme stretch of courtesy, and whose impartiality was shown by his having in a public address declared himself strongly convinced of the justice of the claim of one of the parties to the controversy he was to assist to determine—shows that the condition of affairs on the American coast was almost intolerable.

In the "Remarks" added to the report of the Court Martial, the apologist takes up the familiar line followed by most British naval men of the period: "What course was left to the Commander-in-Chief of His Majesty's Squadron on this station \* \* \* than either to allow his ships to be dismantled in the American Harbours \* \* \* or take the very step he did? The theatre for the decision of this important question was the most appropriate that could be chosen

<sup>3</sup>Hon. John W. Foster, once Secretary of State at Washington and Agent for the United States on the Alaska Arbitration. See his "Diplomatic Memoirs" (1910) Vol. II, pp. 197, 198 and his address at the first meeting of The American Association for the Judicial Settlement of International Disputes, Washington, D. C., December 15th, 1910.



—the open ocean \* \* \* no quibbling civilians were admitted \* \* \* The demand being made and the reply given, the facts were completely at issue between the parties. And what was the result? Jenkin Ratford a deserter from His Majesty's ship *Halifax*" and others "were found on board and very properly taken out by Captain Humphrey." "In the present eventful state of the world the British Navy in the course of Providence forms the only barrier between France and Universal Empire. That this barrier may not be either weakened or destroyed ought not only to be the wish of Great Britain but of America also. Their rulers may be at present fascinated with French violence or they may be deceived by French intrigue. But if they do not carefully look to the evils that are impending, it is highly probable the day is not far distant, when they will feel the effect of their blunders and temerity."

The apologist concluded by saying that if the same undisguised courtesy and hospitality had been practised as marked the conduct of the British Captain, Stafford, who delivered up deserters from the American forces, "the harmony of the two Nations would never have been interrupted and the commercial prosperity of both gone hand in hand with each other."

But our *Halifax* writer was more "royalist than the King." As soon as the American ambassador communicated the facts to the British Government, the act of boarding the *Chesapeake* was repudiated. An awkward intermingling of this question with others prevented full satisfaction being given immediately, but in the long run, Berkeley was recalled, his act apologized for, those who survived of the men who had been taken from the *Chesapeake* were replaced on her deck and pecuniary provision was made for the families of such of the crew of the *Chesapeake* who were killed as were not British deserters.

Berkeley was not further punished; but, like Commander Wilkes, whose act half a century later in boarding the British steamer *Trent* and taking therefrom the Southern envoys was disavowed by his government, he continued to be held in honour by his fellow citizens. It is often said, and as often denied, that these circumstances had an effect in bringing on the war of 1812; the effect was not direct because the matter was settled amicably in 1811; but that there was an indirect effect by providing or continuing a state of irritation, I think there can be little doubt.

Britain claimed (and did not give up the claim till 1870) that no natural-born subject could shake off his allegiance without the consent of his sovereign. That, as an abstract proposition, the United States did not so much find fault with—it was the putting



this principle into operation that caused the trouble. The United States admitted the right of Britain to search American ships for British seamen anywhere in British waters; Britain admitted that she had no right to search American ships in American waters; the dispute was as to the right to search American ships in the open sea. The war of 1812 did not settle the question nor did Webster, thirty years after, procure a settlement from Ashburton; but there has since been no need to exercise the alleged right, and it is hard to conceive of any circumstances in which it could again be asserted.

There never was any doubt, however, that it was as gross a breach of international law for a British war-ship to force an entry upon an American war-ship as it would be to force an entry into an American city.

But while diplomats were negotiating, "Jenkin Ratford, Ordinary, born in London, aged 42," was on that Monday morning at quarter past nine o'clock in Halifax Harbour hanged by the neck at the fore-yard-arm of His Majesty's Sloop of War Halifax, as a warning to all in like case offending.

# CAPACITY TO REPORT UPON MOVING PICTURES AS CONDITIONED BY SEX AND AGE

## A CONTRIBUTION TO THE PSYCHOLOGY OF TESTIMONY.

EDWIN G. BORING.

The adequacy of the "picture-test" for the determination of the reliability of report upon a series of events has yet to be demonstrated.<sup>2</sup> It can not be assumed that excellence in the description of a static scene presupposes excellence in the report upon events. On the other hand, the event-test, when it is made to include human action, presents difficulties of accurate control. The disadvantage of both forms of tests can, however, be obviated by the use of the moving picture—the method employed in this experiment.

There is considerable difference of opinion as to the reliability of children as witnesses. Some psychologists regard them as very unreliable, while others maintain that, under usual circumstances at least, they are quite the equals of adults.<sup>4</sup> In the present experiment, children and adults, of both sexes, were employed for the purposes of comparison.

<sup>1</sup>Studies from the Cornell Educational Laboratory No. 21. This work was performed by the author in 1912. The general plan was suggested and supervised by Professor G. M. Whipple now of the University of Illinois, then in charge of educational psychology at Cornell University.

<sup>2</sup>H. GROSS (Zur Frage der Zeugenaussage, *H. Gross' Archiv*, 36; 1910, 372ff.), thinks that ability to report accurately upon a picture does not raise the presumption that the individual would be able to report upon a series of events accurately and doubts the value of the picture-test for jurisprudence. H. B. GERLAN, Zur Frage der Zeugenaussage, *ibid.* 39; 1910, 116ff., on the other hand, believes in the significance of the picture-test for legal procedure.

<sup>4</sup>A. BAGINSKY (*Die Kinderaussage vor Gericht*, 1910), and E. DUPREE (*Le temoignage: étude psychologique et médico-légale*, *Rev. d. deux Mondes*, 55; 1910, 343), believe that children are in general unreliable. J. VARENDENCK (*Les témoignages d'enfants dans un procès retentissant*, *Arch. d. Psychol.*, 11; 1911, 171), has shown that the replies of children to implicative and suggestive questions are unreliable, while K. MARBE (*Kinderaussagen in einem Sittlichkeitsprozess*, *Fortschr. d. Psychol.*, 1; 1913, 339ff.), and MEHL, *Beitrag zur Psychologie der Kinderaussage*, *Arch. f. Krim.-Anthrop. u. Kriminalistik*, 49; 1912, 193), report instances which show the danger of accepting the testimony of girls under certain emotional conditions. On the other hand, GROSS (*op. cit.*), and R. HEINDL, (*Die Zuverlässigkeit von Signalementaussagen*, *H. Gross' Archiv*, 33; 1909, 102) and E. v. KARMAN (*Kriminalistische Beiträge III, Kinder als Zeugen*, *ibid.*, 50; 1913, 231), conclude that children constitute perfectly adequate observers—at least under certain circumstances.

For general summaries of this literature, see G. M. Whipple, *Psych. Bull.*, 7: 1910, 365ff.; 8: 1911, 307ff.; 9: 1912, 264ff.; 10: 1913, 264ff.; 11: 1914, 245ff.; 12: 1915, 221ff. (Most of these have also been reprinted in this JOURNAL.)

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2. The minimum of the indeterminate sentence shall not be less than the minimum term of imprisonment fixed by the statute under which such person shall have been convicted and the maximum not more than the maximum fixed in such statute; provided that where no minimum term is fixed in such statutes said minimum term shall be taken and intended as being one year.

3. Consists of three members to be appointed by the governor.

4. To appoint a parole officer for each congressional district of the state; adopt a uniform system for the marking of prisoners by means of which shall be determined the number of marks or credits to be earned by each prisoner as a condition of release on parole, and such other regulations as may be necessary for the carrying out of parole act; upon an application for parole investigate conduct of prisoner during term of imprisonment and if it has been such as to entitle him to it to grant parole and to revoke any parole for violation thereof.

5. No provision for argument; prisoner makes application to board in writing.

6. All prisoners under an indeterminate sentence who have served the minimum term, or if any such prisoner has by particularly meritorious service and highly exemplary conduct earned additional or double commutation of time as provided by law, then when he has served as much as one-fourth of the minimum term of his sentence, but not less than one calendar year.

7. Good conduct during imprisonment.

8. Keep the peace and be of good behavior.

9. Not defined in act.

10. Revocation of parole by Parole Board, which in the hands of any sheriff shall be sufficient warrant for arrest.

11. Revocation of parole.

12. Discretion of Parole Board or expiration of sentence.

13. Pardon or expiration of term of sentence or reduction of latter in discretion of Parole Board.

14. Eleven to date.

15. See No. 1.

16. About 400.

17. No answer.

## A CASE OF IDENTITY

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WILLIAM RENWICK RIDDELL<sup>1</sup>

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The most extraordinary criminal case in many respects in Upper Canada was that of a person charged with crimes committed by William Townsend.<sup>2</sup>

William Townsend was born near Fort Porter, now Black Rock, in the State of New York in 1828. His father Robert Townsend was of good stock, being descended from Sir Roger Townsend,<sup>3</sup> who landed at Plymouth in 1530. Robert, born in Massachusetts, came with his brothers to Buffalo during the war of 1812; he was a carpenter and shipwright and enjoyed an excellent reputation all his life. He married Mary Ann Wright, the widow of an American soldier who had been killed during the war along with her brother William Caskey at Fort Porter. The Caskeys were descendents of Joseph Caskey, a Church of England missionary, whose church was burned by the Indians; he escaped, to live a missionary for over fifty years.

Robert Townsend bought land near Fort Porter and there three of his children were born, William being the eldest. Then he crossed the international line and worked on the Welland Canal, taking part in building the docks at Port Dalhousie. Afterwards he bought land known later as the "May Farm," some two miles from Port Dalhousie, and built a house on it in which he lived with his family for a time. The frame work of the old Townsend house was still standing a few years ago. Selling out this farm, he bought some wild land between Canboro Village and Canfield, where he lived until his death in 1844.

When about thirteen William joined the government ship "Mohawk" as a helper in the galley, etc. Leaving the service in 1844, he helped on his father's farm near Canfield for two years dur-

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<sup>1</sup>Justice of the Supreme Court of Ontario, Toronto, Can.

<sup>2</sup>The facts of this curious case are taken from contemporary newspaper reports of the two trials, the official record at Welland, two contemporary pamphlets containing accounts, an article in the People's Press, published at Welland, January 19, 1915, on the "Townsend Gang," by "The Old Timer," and an answer in the same paper, May 25, 1915, by a "Niece of Bill Townsend," and material derived from private inquiry. I have tested the information and believe what is set out in the present article will be found accurate. The Judge's Notebook is not available; Mr. Justice McLean kept the notes of the civil and the criminal cases in different books and that containing the latter seems to have been lost. *Valde deflendus*.

<sup>3</sup>Sir Roger Townsend seems unknown to the biographers.



ing his father's last illness. On the death of his father in 1846, William joined the government ship "Montreal" as a "second-class boy"; he deserted in 1848, but rejoined the "Mohawk" in 1849, remained but three months and then again deserted when in Cleveland, because he had been ordered to paint the ship's bottom with red ochre. He had been entered in the ship's books as William Townsend, but was always known by the name "Little Davy Crockett"; his conduct is said to have been good while in the service.

After leaving the government employ, he worked on the farm, sailed a little, worked in saw mills, as a cooper, etc. He was not a good workman, but rather a jack-of-all-trades. He was also for a time a cab driver in Hamilton, drove the stage from Hamilton to Cayuga, and did some trading on the Welland Canal, but had no steady employment.

He was an apt mimic and could imitate many dialects: his great delight was to play the violin or tambourine and bones, to black up and sing and dance as a "Nigger Minstrel." He formed a Nigger Minstrel Troupe and gave concerts round the country. These seem to have pleased the people, as one lady swore she attended eleven of the entertainments; probably the art was not of a high grade, however. He does not seem to have fallen a victim to the then national vice of drunkenness,<sup>4</sup> but in other respects he became depraved. With others he formed a gang of pickpockets and thieves operating in Hamilton and around Canfield; of this gang it is probable he was not the leading spirit; that place seems to have been held by one Lettice, an Englishman, who came to the Townsend place under the name of Anderson; there were also persons of the names of King, Blowes, Bryson, Patterson and Weaver, who seem to have made up the number of members.

While many depredations were committed, blood was not, so far as known, shed by the gang until October, 1854.<sup>5</sup> On the Talbot Road, a few miles west of Cayuga, lived at Nelles' Corners, John Hamilton Nelles, a member of one of the most respectable families of Upper

<sup>4</sup>The "Niece of Bill Townsend" says, "Townsend's troubles commenced when he started going to a hotel in Cayuga—just as all young men do when they start drinking that awful curse whisky"—and she adds that on the night of Nelles' murder, "Townsend had been drinking," "Townsend's whiskey was talking"; but at the trials some who knew him well testified that he did not drink.

<sup>5</sup>After the murder of Nelles and Richards there arose memories of many other murders supposed to have been committed by the "Townsend Gang" or the "Notorious Bill Townsend." Bryson "the Queen's Evidence" swore at the first trial that Townsend told him that he had shot five men once in one house, "for dead men tell no tales"; but no other homicide than those of Nelles and Richards has ever been traced to him or his gang.

Canada and himself of high standing in the community. A knock came at the door in the night of October 18, 1854; Nelles first opened the door and then closed it; it was pushed open and five men entered. One said, "You are the scoundrel who shut the door in my face" and immediately shot Nelles.<sup>6</sup> The robbers then took what money there was, also a gold watch; and opened a trunk in search for valuables. Nelles died in a few hours.

The gang fled; (they had committed several robberies on the same day). Blowes was caught in Hamilton in the house of one Mrs. Mary Ann Arno or Arnold, otherwise known as Limping Jenny, a lady whose reputation limped worse than her name; King was captured at his father's farm near Barrie, about 70 miles north of Toronto; Lettice was shot and killed by a constable on Squaw Island,<sup>7</sup> when attempting to escape, and Bryson was taken in Hamilton.

Bryson, King and Blowes were tried at Cayuga for murder, and convicted; King and Blowes were hanged, while Bryson's sentence was commuted to imprisonment in the penitentiary for life. (See Note 12 post.)

Townsend first went home, then went to St. Catharines and probably to Buffalo and later concealed himself for a time at the house of his brother-in-law John Horn; at length on November 2nd he came out of hiding and made a break for freedom. Going with a man, who was afterwards identified as Lettice, toward Port Robinson they met Jacob Gainer, who had sold a load of wheat there, and robbed him of his money, Townsend telling him that he had shot a man at Nelles' Corners and needed the money to get out of the country. The two fugitives went on to Port Robinson and had dinner at the Jordan House. Gainer laid an information before Mr. James McCoppen, J. P.; he called Charles Richards a constable who went at once to the Jordan House, followed by McCoppen. Asking

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<sup>6</sup>It is possible that the person who actually shot Nelles was Lettice (or Anderson), but the evidence points directly to Townsend; that Townsend killed Richards there never was any doubt.

<sup>7</sup>Lettice (as will appear below) went with Townsend when he made a break for freedom. The constables searching for Townsend along the Canadian border at Fort Erie, Bridgeburg, etc., heard that a man had been seen on the river bank. They took a small boat and rowed over to Squaw Island to see if he had gone there. They found a young man on the island, who ran from them; he refused to stop when called on to do so, and climbed upon a barn where he was shot by the pursuing constables. He was positively recognized as Lettice, but there always has been a doubt. One story is that Lettice died some years after in Chicago, having assumed the name of Townsend before his death. He is said to have stated that his real name was Anderson, that he had shot a man near Welland, and had robbed many stores in Ontario, etc. Such stories are not infrequent: it is not worth while here to discuss the truth of this.



Mr. Jordan if there were any strangers in the house, he was informed of the two who were there. When one of them came out of the bar, McCoppen entered into conversation with him and Richard, recognizing him as Townsend, laid his hand on him; Townsend turned around and said, "Let go of me or you are a dead man." Richard retained his hold and Townsend shot him dead and made his escape. A large reward was offered for the arrest of the criminals, including Townsend.

His immediately subsequent movements are not known; but a day or two thereafter he boarded a train on the Great Western Railway from Hamilton to Windsor. This fact was telegraphed along the line; and at Woodstock the sheriff and the gaoler with four assistants went on the train and found him. By most consummate assurance he lulled their suspicions, said he knew they took him for Townsend, but that he was a traveller from east of Rochester going west. He came upon the platform, talking easily and with a smile, and "jollied" them along until the train had acquired a good rate of speed; then he "darted away like a deer and leaped on the last platform of the last car." By almost incredible stupidity and ineptitude, the Woodstock authorities did not telegraph what had happened.

He was, it is believed, seen by an old schoolmate, George May, in Chicago, coming off the cars in the "fall of 1854." He asked May not to call him Townsend, giving a name with a "Mac" in it, and said he was on his way to New Orleans and from there to Australia or California. No information of this, however, came to the authorities till long afterwards.

The next heard of him was in August, 1855, when the sheriff at Rock Island, Illinois, thought he found him in the person of an actor in one of the "side shows" of Stone and Van Amburg's Circus and Menagerie; as he mentioned the fact *in confidence* to the proprietor of the show and the proprietor repeated it *in confidence* to the ringmaster, the fact was ultimately repeated *in confidence* to the suspected person, who promptly disappeared before a Canadian officer could arrive. It was believed at the time that he had gone to California by the Overland Route; but this was never verified.

The next act in the drama was played in Ohio. One morning in April, 1857, on the train on the Columbus and Cleveland Railway, leaving Columbus about 1:30 a. m., the conductor Knowlton found a man who had no ticket and no money to pay his fare, \$3.50. He told the conductor he had come from Nicaragua and offered his



Colt's revolver, fully loaded and freshly capped,<sup>8</sup> as a pledge for the amount of his fare. The conductor *faute de mieux* took the pistol; and shortly after the arrival of the train at Cleveland, about 8 a. m., the passenger came to Knowlton's house for his pistol; but, as he had no money, Knowlton refused to give it to him. The man came back again, and Knowlton refusing to go with him to River street ("a rather disreputable place"), where he said he had a friend who would help him to "raise the wind," took him to a hotel kept by John Iles at 110 Erie street. Iles had previously lived in Canada and knew Townsend well. He was washing some tumblers when the conductor and his passenger came in; and he was so startled at seeing the man whom he took for Townsend that he let one of the glasses fall. Iles told him to go and get his supper, and he himself ran and informed the police. The man was arrested, later identified by witnesses from Canada and extradited.

During his six months' incarceration in the Gaol at Cayuga awaiting the Fall Assizes, he was visited by many of the friends and acquaintances of William Townsend, including his mother (Mrs. David Dewar), his stepfather (David Dewar), his brother-in-law (James B. Smith) and his sisters, Mrs. Smith and Francis Townsend, all persons of respectability. They all insisted that the prisoner was not Townsend. Many of Townsend's old acquaintances on the other hand were equally confident that the prisoner was Townsend; and the countryside was divided into two factions.

The prisoner was very reticent: he said his name was Robert J. McHenry, that he had come from near Glasgow, Scotland, and had

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<sup>8</sup>To those who are accustomed to the breach-loading revolver with fixed ammunition it sounds odd to speak of a revolver as being "capped"; but in my early boyhood the revolver was muzzle loaded and had percussion caps.

Fixed or metallic ammunition came into fairly common use in the 60's. I used it myself in the "Remington four shooter" and single barrel as early as 1865, but the Colt revolver was not made for firing such ammunition until after 1870. The first U. S. Army Colt for metallic cartridges (called the 45 caliber Colt Army Revolver) was tested 1871 to 1874 before being adopted by the Army, and in this the chamber of the cylinder had to be loaded with cartridges one by one from the rear. This Colt was very much like the celebrated Colt Frontier, caliber 44, of which many hundred thousand were sold.

The Colt Navy revolver had cap and ball cylinders until the late 70's, when some of them were converted into metallic cartridge weapons. The modern Navy revolver with its cylinder allowing all the empty shells to be ejected in one act and reloading by a loading pack was adopted as late as 1889.

The late adoption of the metallic cartridge for Colt revolvers was due to the patents of Lindner (1854), Rollin White (1855), and Mayall (1860); but Colt made 65,000 Burdan rifles with such ammunition for the Russian government about 1868-1871.

been with Walker<sup>9</sup> in Nicaragua; but he refused to give any further account of himself. He was perfectly confident of acquittal, retained no lawyer and subpoenaed no witnesses.

The Fall Assizes came round; a true bill was found against William Townsend for the murder of John Hamilton Nelles, the prisoner was arraigned under the name of William Townsend, and under that name pleaded Not Guilty, announcing himself ready for his trial without counsel or witnesses. This course astonished the Assize judge, Mr. (afterwards Chief) Justice McLean and the Solicitor General,<sup>10</sup> Henry Smith, who was conducting the prosecution for the Crown. Fortunately for him, Mr. S. B. Freeman, an able and

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<sup>9</sup>William Walker, "the last of the Filibusters," was born in Nashville, Tenn., May 8, 1824, of Scottish parentage. He became a doctor, lawyer and journalist, practicing medicine in Nashville and Philadelphia, law and journalism in New Orleans and in 1850 became editor of the San Francisco Herald. He also practiced law in California. In 1853 with a band of some 170 followers he invaded Lower California and Sonora (Mexico), but was driven out by Mexican troops. In 1855 he invaded Nicaragua, Central America, with 56 followers, and in 1856 he was elected president of that so-called republic. Defeated towards the end of the same year by the Legitimists of Nicaragua, assisted by the Costa Ricans, he went to Panama. After two attempts to recover the country, which were rendered futile by the intervention of the United States, largely at the instance of Vanderbilt, he ultimately in August, 1860, again invaded Nicaragua. Captured in September by Captain Salmon of the British warship *Icarus* he was delivered to the authorities of Nicaragua, tried by court martial and shot at Trujillo, September 12, 1860. His own work, "The War in Nicaragua," published in 1860, must be read with caution, but a very full and satisfactory account is given of this last and greatest of American filibusters in "The Story of the Filibusters," by James Jeffrey Roche, London, T. Fisher Unwin, 1891.

Assuming that the prisoner was the McHenry of Chips' Flats, California, as sworn at the second trial, it was not impossible that he had been with Walker in Nicaragua. The last account we have of McHenry at Chips' Flats is in October, 1854; Walker sailed from San Francisco for Nicaragua with the "Immortal Fifty-six" in the brig *Vesta*, May 5, 1855; and while it was not till May, 1857, that he left Nicaragua, some of his soldiers had already gone home disheartened with the failing fortunes of their leader.

But there were hundreds, even thousands, who claimed to have been "with Walker in Nicaragua," who had never seen him; many accounted in that way for an otherwise unexplainable absence from the view of their friends and there have been since that time as many "last survivors" of Walker's Expedition as of the "Light Brigade" of Balaclava fame.

<sup>10</sup>In the early times of the province the law officers of the crown, i. e., the attorney general and the solicitor general claimed the right to conduct all prosecutions for the crown and (incidentally) received the rather substantial fees for such services. But as the province became better settled and the number of courts increased, it was found necessary to retain other counsel; and gradually the law officers began to omit to conduct prosecutions. By the time of those trials it was unusual for either attorney general or solicitor general to take the crown briefs except in very important cases—the solicitor general in opening said: "The present inquiry is a most important one, so much so that the government have thought fit to request me to attend to conduct the case, although I am not in the habit of going the circuit." (Smith lived in Kingston.) There has been no instance for many years of a law officer of the crown taking a criminal prosecution—certainly none in my time, thirty-five years.



brilliant barrister of Hamilton, was attending the Assizes. After the arraignment, when the prisoner had been remanded for trial on the following day, a number of those interested in him spoke to Mr. Freeman; and he voluntarily undertook the duty of conducting the defense, associating with him Mr. Start, also of Hamilton, a barrister of good standing and great ability.

There was no difficulty in proving that Townsend had been present at the murder of Nelles and if not the actual perpetrator of the deed, was aiding and abetting; the sole defense was that the prisoner was not Townsend.

The prisoner was a man of about 5 feet 7 inches in height; his complexion was somewhat pale; his cheeks were thin, his face was elongated, but cheerful, his eyes large and of a peculiar light blue, his hair dark brown, and eyebrows of a lighter tint, not meeting over the nose, but well arched, his forehead large, heavy and somewhat high, his nose large, thick at the top and rather bent from the bridge downward. He had a scar above his left eyebrow about an inch long and inclining toward the temple, and another of the same size on his under lip; his chin was long and prominent, his cheekbones rather high and from the left cheek bone there was a large broad scar nearly three inches long and extending downwards. All witnesses agreed that he was thinner and paler than Townsend.

There was little difficulty in obtaining a jury, the Crown did not challenge, and the defense challenged only those who had expressed opinions and few from certain neighborhoods. (In an experience of thirty-five years I have never known it took more than half an hour to procure a jury in a murder case in this province.)<sup>11</sup>

Bryson, who turned "Queen's evidence"<sup>12</sup> and who was brought from the Kingston penitentiary, identified the prisoner most posi-

<sup>11</sup>There is nothing which more amazes an Ontario barrister in the practice of some of the courts of the United States than the extraordinary length of time taken in procuring a jury; we, a busy and poor people, could never afford the time. Every prisoner is allowed to have a copy of the jury panel four days before the sitting of the court, and is expected to have his objections ready; while we do not allow the examination of jurymen by counsel on either side.

<sup>12</sup>When Bryson was arrested he made a full confession; he was tried, convicted and sentenced to death at the same assizes as Blowes and King (his confession was not used against him). His youth aroused sympathy, and petitions were presented to the governor general by William Lyon MacKenzie, M. P. P. (the well-known rebel of 1837), Joseph Curran Morrison, M. P. P. (afterwards Mr. Justice Morrison), and many others; and apparently influenced by his youth and his frank and full confession, Bryson's sentence was, May 3, 1855, commuted to imprisonment for life.

While he was not called as a witness against King and Blowes, he was



tively, but gave the important evidence that Townsend wore earrings the nine months he knew him, that he wore them when he shot Nelles and took them out at Buffalo at the United States Hotel—there were no holes in the prisoner's ears or any indication that there ever had been. Another convict was equally positive, as were eighteen other witnesses, nearly all of whom had known Townsend well, including the captain of his Militia Company; and six thought him to be Townsend, but would not swear to the identity. This evidence took up the first day and part of the second, September 24 and 25, 1857.

During the first day the prisoner was allowed to wear his beard; but the Crown prosecutor ordered him to be shaved before the second day's proceedings began; at first the prisoner objected to this, but finally yielded with good grace.

The evidence of identity on the first day was general, but the second witness (Wait) on the second day deposed that Townsend had a scar from the joint of the large toe of the right foot to the ball of the foot; the prisoner's boot being removed, a scar, much such as had been described but a little smaller, was manifest. That Townsend had such a scar was sworn to by another witness who said it had been caused by a cooper's adze. The next witness (Brooks) described a scar above the left eyebrow of Townsend and pointed out to the jury a similar scar on the prisoner; the next witness corroborated this, as did four others. That Townsend had a scar on the lower lip like the prisoner was sworn to by only one witness—and he seems to have been unreliable; that he had a scar on the left cheek was deposed to by four persons, one saying that it had been caused by a burn; one witness had never seen such a scar on Townsend's face and another was not sure. Thirty-two witnesses were called for the Crown in all.

For the defense forty-nine witnesses were called, most of whom knew Townsend well and all of whom swore the prisoner was not he—Townsend's mother, step-father, brother-in-law and two sisters were amongst those called. All gave general evidence, but many gave reasons for their belief as well. No one seems to have known of the scar on the right foot, but two admitted the scar over Townsend's left eye. There was a consensus of opinion that Townsend's eyes were

brought up from Kingston penitentiary as a witness on the two "Townsend" trials.

He identified the prisoner without hesitation or equivocation. He said on his examination that he hoped that he might be pardoned "because I know I did not commit the murder," but "I expect no reward for giving testimony"; he was pardoned June 22, 1868, after serving more than thirteen years. I do not know anything of his subsequent history.

blacker than those of the prisoner, being described as "black," "dark," "hazel," dark gray," "not quite jet black," etc., very different from the prisoner's blue eyes. The witnesses agreed that Townsend's hair was dark, almost black, and straight as an Indian's, while, as one pointed out, the prisoner's hair curled. Townsend's eyebrows were heavy and black, and they nearly met; his face was "short and fat," "square" not long; his forehead was low; his mother, sisters and stepfather testified to the big joints of his feet, different from those of the small and rather dainty feet of the prisoner. Several who had seen him daily for years told of his speaking through his nose or clenched teeth, of his downcast look, his feminine voice and beardless appearance. Several admitted than seen at a particular angle the prisoner looked a "*leetle* like Townsend"; but all were confident that they were not the same. Mrs. Dewar and her two daughters swore to Townsend having the letters W. T. and an anchor on his arm, put on with India ink or powder; and it appeared that the anchor on the wrist was part of the description sent along the line of railway when Townsend was making his escape. Another witness Quick deposed that if the prisoner was Townsend he would have a scar on the left arm an inch and a half long; the prisoner at the request of his counsel bared his arm, and no scar, anchor or letter was to be seen.

Mr. Freeman said he did not think it necessary to address the jury; the Solicitor General took the same course and the trial Judge gave a short and impartial charge, telling the jury that there was really but the one question to decide, "Is the prisoner William Townsend?"

After six and a half hours of consultation the jury announced their inability to agree; one jurymen desired the Judge's opinion, which was of course refused; and the jury were discharged. It was ascertained that the division in the jury was: For conviction 7, for acquittal 4, undecided 1.

The delay in finding a verdict seemed to dismay the prisoner who lost little by little his jaunty and confident air; the failure to agree hit him hard, he thought "it was the d—dest piece of business he ever came accross." The trial judge remanded him to prison till the next Assizes, six months later, informing him, however, that if he could produce satisfactory evidence that he was not Townsend or could show who he really was, he would be admitted to bail—the prisoner declined and spent next day writing letters.

During the interval many efforts were made to induce the prisoner to give some account of himself, and offers were made to him to



collect a fund for his defense; he steadfastly refused, saying that he did not require money, all he had to do was to prove an alibi; to one he spoke of being in communication with his friends, to another "You do not know my family history, there are things which rather than expose I would die on the gallows"—the offers of others he treated with contempt, silent or avowed. He did, however, unburden himself in part to a Scotsman from near Glasgow, Walter Maitland; to him he said he came from Springburn, two miles from Glasgow, and he gave an accurate description of the place, the names of the farmers, etc.—a description which could hardly have been made up, except from personal knowledge of the locality. At the second trial it was attempted by the Crown to explain this knowledge by the fact that Townsend's brother-in-law, John Horn, was a Scotsman; but he came from Dunfermline, not at all near to Glasgow, especially in those days; and the other Scot, the step-father, David Dewar, came from Cupar in Fifeshire and knew nothing of Springburn.

Considerable interest, however, was taken in the case, and a small fund was collected for the payment of witnesses.

A letter written by him at the urgent advice of a Justice of the Peace near Cayuga, in June, 1857, shortly after his incarceration at Cayuga, began to bear fruit; and the effect was manifest at the next trial. This was written to "Mr. J. Anderson, Recording Scribe, Sons of Temperance, California"; and stated that the writer "R. McHenry"<sup>13</sup> had been charged with a crime committed in Canada when he was residing at "Chips' Flats," California—this was published in newspapers far and wide and produced a crop of witnesses for the prisoner.

It was determined to proceed at once against the accused for the murder of Charles Richards at Port Robinson; and as the locus of this crime was in the County of Welland, he was removed from Cayuga Gaol (in the County of Norfolk) to Merrittsville,<sup>14</sup> in the

<sup>13</sup>At the second trial this letter was produced, it detailed the history of McHenry in Cleveland and California, and mentioned a number of books in which McHenry's name was recorded in California. Much was made by the Crown of the difference in name. The prisoner signed "R. McHenry" to the letter, whereas the signature "Robert J. McHenry" appeared on the Sons of Temperance books in California. Mr. McDonald, the Crown counsel, said during the progress of the defense, "he had intended to prove that there had been an R. McHenry in California, and that this man had taken his name and written in his name for the papers, which he never would have got had he written R. J. McHenry." But no attempt at proof of that character was made, although there was much cross-examination as to other persons in California called McHenry.

<sup>14</sup>This, the county town of the County of Welland is now called Welland.



County of Welland. At the Assizes (called on the Criminal side, the Court of Oyer and Terminer and General Goal Delivery)<sup>15</sup> on October 7, 1857, a true bill was found against the prisoner under the name of Robert John McHenry for the murder of Charles Richards; on being arraigned before Chief Justice Draper he pleaded Not Guilty; and on motion of his counsel, Mr. Start, the trial was postponed until the Spring Assizes.

At the Spring Assizes before Mr. Justice McLean, at Merrittsville on March 25, 1858, the bill found at the previous Assizes was quashed on motion of the Crown Counsel; and on the same day a true bill for the murder of Charles Richards was found against "William Townsend, otherwise called Robert John McHenry"; to this indictment the prisoner pleaded Not Guilty and the trial proceeded next day, Friday, at 9 a. m. It lasted Friday 9 a. m. to 10 p. m., Saturday 9 a. m. to 10 p. m., Monday 9 a. m. to 10 p. m., Tuesday 9 a. m. to 4:45 p. m., when the Crown rested, having called 62 witnesses; the defense Tuesday 4:45 p. m. to 9 p. m., Wednesday 9 a. m. to 9:30 p. m., Thursday 9 a. m. to 8 p. m., Friday (Good Friday) 9:30 a. m. to 9 p. m., Saturday 8 a. m. to about noon, when the defense rested, having called 89 witnesses; rebuttal began and continued until 7 p. m., Monday 8 a. m. to 10:15 a. m., having produced 18 more witnesses. The leading counsel for the prisoner, Mr. S. B. Freeman<sup>16</sup> (Mr. James G. Currie was with him), addressed the jury 10:15 a. m. to 2:15 p. m., being followed by leading Counsel for the Crown, Mr. Rolland Macdonald (Mr. Robert Harrison was with him), till 4:55 p. m.; the Judge's charge took till 8 p. m., when the Court rose to resume Tuesday, April 6, at 9 a. m. At 4 p. m. the Jury returned with their verdict, Not Guilty, adding "the prisoner is McHenry."

<sup>15</sup>At that time the trial courts were separate courts from the Court of Queen's Bench and Common Pleas, but were presided over by judges of these courts. On the criminal side the trial courts were Courts of Oyer and Terminer and General Gaol Delivery; on the civil side, Courts of Assize and Nisi Prius. The same judge presided in both and the courts were commonly called "the Assizes"; the judge "the Assize Judge." All these technical distinctions are fully explained by Blackstone in his commentaries: they came to an end in Ontario in 1881 by the operation of the Judicature Act, 44 Vic., c. 5 (Ont.).

<sup>16</sup>Mr. Freeman, who was not only a man of high legal attainments but also of the highest character, told the jury how he came to defend the prisoner on the former trial and said: "He asked the prisoner nothing about his history or circumstances, but contented himself with hearing the evidence. On that occasion he knew no more of the prisoner than what he had learned from the witnesses on the previous occasion, except that he had received certain documents from California which had not been allowed to be put in as evidence." He was referring to a letter from California to the Governor General of Canada from residents of Chips' Flats in California concerning McHenry, which, on objection by counsel for the Crown, was not allowed to be put in—an unexceptionable ruling.

Both parties were better prepared for this trial, having at the previous trial learned the weak points of attack and defense.

Very many of the witnesses on both sides swore generally without adducing reasons for their belief that the prisoner was or was not Townsend; some, however, condescended to particulars and gave reasons.

The first thing to be noticed is that several witnesses for the Crown swore that Townsend had "blue eyes," "large blue eyes," one even saying "light blue eyes." This was opposed by an overwhelming mass of evidence that his eyes were black (one schoolmate said that he was known at school as "Blackeyes"), "dark," "very dark," "dark hazel," "dark brown," etc. So much was the Crown impressed with this evidence that two medical men were called who testified that "persons' eyes might grow lighter or darker so that it is possible for a man to have a dark blue eye one year and a light blue eye four or five years afterwards"; one doctor spoke of a certain child with light blue eyes, when she was grown up having them dark hazel (this is of course a well known phenomenon, but no one swore that a dark or black eye ever grew to be a blue).

The hair of Townsend was said by many to have been darker than that of the prisoner, but several said it was sandy and lighter—one endeavoured to account for the color apparent by saying it might have been dyed—most of the defense witnesses swore to Townsend's hair being black and straight as an Indian's, and it seems to have been taken for granted and almost admitted that the prisoner's was considerably lighter than Townsend's.

Counsel for the Crown in his address to the jury "threw aside all the testimony as to the color of this man's hair and eyes. One often knew nothing about the color of hair and eyes of one's friends . . . even now it was difficult to say whether the prisoner's hair was black or brown." Mr. Freeman on the contrary triumphantly exclaimed to the jury, "Would this man, the prisoner, ever be called 'Black-eyes?'" No doubt he was wise in dwelling upon this apparent trifle; a little thing like that notoriously has an immense influence with a jury.

The scars came in for considerable attention—that over the left eye seems to have much resembled one borne by Townsend, as did that on the right foot. But the large scar on the left cheek was the subject of much contradiction; at least nine witnesses swore that Townsend had such a scar, while as many swore positively he had



not—these included Townsend's step-father and some of his most intimate friends—and nearly a score had never noticed such a scar as they thought they must have done had it existed. One witness for the Crown swore that the scar was caused by Townsend being kicked by a horse, but he was speedily discredited; the man who was in fact so kicked being called as a witness.

The dramatic episode of the scar on the left arm, which occurred in the first trial was not repeated; the witness David Quick was not called on the second trial at all.<sup>17</sup>

The marking in Indian ink or powder on Townsend's left arm—a mermaid (or anchor)—was again sworn to by several, amongst them certain witnesses called for the Crown; but its absence on the prisoner was discounted by the evidence of two who swore that they had themselves had similar Indian ink marks removed "by putting breast milk on the arm over the mark and then pricking the arm in the same place again"—other similar cases were deposed to; and no point was made of the mark by either Counsel or by the Judge. The defense relied strongly upon the ungainly feet of Townsend; "lumpy," "with the big toe over-riding," "in fact big lumps which showed through a boot." One witness swore, "if that's Bill Townsend he has got new feet on him," another told of getting a pair of boots for him and wearing the new boots for two hours without discomfort, while Townsend could scarcely get them on at all and could not wear them. The prisoner and witness exchanged boots; "that of the prisoner fitted very tight on the witness and that of the witness easily slipped off and on prisoner's foot"; still another spoke of Townsend's foot having "larger lumps than those of mine" (about the size of half an egg)—at the request of a juror the feet were compared and, on this comparison, great difference in size was at once apparent.<sup>18</sup> The fact that Townsend could never write decently and would not read anything but the lightest stuff, while the prisoner spent much of his time in reading or writing was also adduced; as was the want of beard in Townsend and the heavy beard of the prisoner.

<sup>17</sup>No reason appears for the omission to call this witness. The omission of all mention of him or his evidence raises considerable suspicion as to the reliability of his evidence on the former trial.

<sup>18</sup>Dr. Burns had "known lumps on a man's toe joints caused by disease such as gout or by the friction of boots, by the thickening of outside skin; some may be removed." Dr. Brooks said, "the continued use of tight boots might enlarge the toe joints and in some cases, the cause being removed, the enlargement would disappear." But such theories had probably little effect against the ocular demonstration given in court.



It is doubtful whether all these would have secured an acquittal, the defense was not much stronger than at the first trial—it was the *alibi* evidence which turned the scale.

Mr. O. C. McLouth, an attorney of Sandusky, Ohio, testified that the prisoner had been confined under the name of Robert J. McHenry in the Sandusky gaol from July, 1851, to March, 1852, on a charge of assault, which ultimately was not proceeded with—he then represented himself as an American (if this evidence was true, the prisoner could not be Townsend, as he was employed as a cooper by Benjamin Diffin in Canada February, 1852).

Captain Turnbull, a lake captain, swore that the prisoner had worked on his vessel, the "Powhattan," as cook or steward at least from early in October to the middle of December, 1852, under the name of McHenry, that he understood him to have come from Scotland and that he then had the scar on the left cheek—that he left Captain Turnbull to go to California.

Captain Lewis, who had been first mate on the "Powhattan," said that the prisoner under the name of "Robert J. McHenry" had been steward on that vessel from August or September until December 18, 1852, that he said he was a Scotsman. Turnbull testified that in the latter part of 1853 or the beginning of 1854 (Lewis said it was about February, 1854) he received a letter written by McHenry, dated in California, September or October, 1853, in which he gave particulars of the work he was at in California. Lewis corroborated this, but unfortunately the letter had been destroyed.

Then came four witnesses who deposed to having known the prisoner at Chips' Flats,<sup>19</sup> in Sierra County, California, one certainly as early as July, another as early as August and the two others in October, 1854. They all gave circumstantial accounts of their intercourse with him—one (Frank J. Huber) had recommended him to join the Sons of Temperance and frequently saw his signature "Robert J. McHenry," another (John Follinsbee) telling of a lawsuit in which they were both interested. That the prisoner had written from

<sup>19</sup>"Chips' Flats" was named after its discoverer, a ship's carpenter, who was, of course, called by the regular nick-name "Chips"—his real name is not given. Much of the evidence of transactions at "Chips' Flats" reminds one of Bret Harte's stories. The witnesses speak of French Corral, Red Dog (Nevada), Yuba County, Balsam Flats, Foster's Bar, Chips' Diggings; "Scotty" was a well known character; Hugh Aikins was generally known by the name of Walton. "There were very few who then knew me by my proper name." "Bill Henry of Forest City kept an eating house and sold beef"; "spoke quick with a kind of Yankee tone," and "was considered a very nice young man." A Jack Follinsbee had taken part in a law suit with McHenry, but "knew him by the name of Bob and no other name."

Cayuga Gaol to James Anderson, recording scribe Sons of Temperance, California, was certain; and unless all these four men were perjured or mistaken, it was impossible that he could be Townsend.

In the light of the dates the evidence that Townsend had been seen in Chicago, and had then said he was on his way to Australia or California, giving himself at the same time a new name with "Mc" in it—one witness thought it was "McHenry"—ceased to be of importance, particularly when the witness (George May), who saw him there, did not "recognize the prisoner as the man—he must have changed very much."

The perfect coolness of the prisoner was apparent throughout the trial; he would hold a candle up to his face that the witnesses could see him better, pointing out the scar on his cheek, urging them to "Take a good look;" "Take off your goggles, old fellow;" "Be sure, sir, take a good look at me; remember the consequence;" telling them "I come of a long-headed race," asserting to the Crown Counsel "I am open to answer any question you like to ask about Scotland;" and when a witness expressed a fear that he would do him harm and had him searched addressing him condescendingly "Poor fellow, come along."<sup>20</sup>

There were some curious circumstances that were not explained—the prisoner seemed to know Iles, he spoke of having been along the Welland Canal and of knowing the Grand River and London (Upper Canada), he spoke of his stealing a boat off the "Mohawk" and selling it at Dunnville, correcting a person who said it was sold at Cayuga; he said he had seen Blowes and knew something about King and was horrified when he was told they had been hanged; he knew Mr. Jennings of Pelham and told Mr. Hellems (when he said that he and Townsend's father were once working building the piers at Port Dalhousie) "You were driving piles." If he and Townsend were not the same person, it is possible that they met at some time; but that is not a complete explanation.

Upon the acquittal of the prisoner, the Crown entered a *nolle prosequi* on the Cayuga indictment and the prisoner was released.

It is alleged by certain members of the Townsend family that William Townsend shortly after his escape enlisted on a U. S. vessel on Lake Erie and wrote his mother to that effect from Erie, Pa.; that he was informed by his mother of the arrest of the *soi-disant* McHenry and he wrote her to let him know and if they convicted

<sup>20</sup>This was believed to be the longest murder trial ever had in this province. The only ones that at all approach it were the celebrated Sifton trials at London.

him he would come and deliver himself up. Nothing of the kind came out in evidence at the trial.

It is also said that Townsend remained on the U. S. boat until the outbreak of the Civil War, when he again wrote his mother that he had been taken off the war boat and was going into the war.

I have not been able to obtain any account of the subsequent career of McHenry.



## THE EXPERIENCES OF A PSYCHIATRIC MISSIONARY IN THE CRIMINAL COURTS

JOHN R. OLIVER<sup>1</sup>

Judges, lawyers and policemen—men who have lived long under the conservative influences of the law—all come from Missouri. They “have to be shown.” And they have to be shown, not once nor twice, but unto seventy times seven. Of course, once they have been subjected to this laborious process, their hearts are yours unreservedly, and they will stand by you and your “modern methods” to the bitter end.

The writer of this article has spent more than two years in attempting to introduce into the criminal courts of a large city modern medico-legal methods of examination and classification. The principle, for which he has striven, may be simply stated. “In the administration of the criminal law, the judge on the bench and the psychiatrist in his psychopathic laboratory should work together.”

The first and the last step in establishing this principle is to convince the judge, by showing tangible results, that the principle is true.

The writer has been fortunate, beyond the lot of many fellow psychiatrists, in the type of legal mind, with which he has had to deal. At all times he found the judges of the various courts more than willing to listen to him, and always interested in what he was trying to attain. The same may be said of the city authorities, with which the writer's work brought him in contact. If, at any time, there was any friction between these two “resorts” of municipal government because of him and of his doings, he himself, at least, was never made to feel it. Few missionaries, psychiatrie or otherwise, have their lines cast in such pleasant places and among such courteous gentlemen—courteous and forbearing, even when they were being forced, as one judge put it, “to envisage a whole chain of new ideas”; when, as the writer has dared to express it, they were claiming their Missourian birthright, and were “being shown.”

The writer's experiences during these past years of effort, that have at last been crowned with some measure of success, may be of interest and of value to psychiatrists, who are working towards similar

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<sup>1</sup>Medical officer and alienist to the Supreme Bench of Baltimore City.

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# American Institute of Criminal Law and Criminology

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**OBJECT.** The object of the American Institute of Criminal Law and Criminology "shall be to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith and co-ordinate the effort of individuals and of organizations interested in the administration of certain speedy justice."

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crime. E. g., of 100 paroled prisoners who violated their parole, a prison record showed that 35 had been classed as mental defectives. Modern science agrees that every court should have attached to it a medical officer who will report upon the accused's mental condition, and that the sentence and treatment of the accused should be determined in the light of this report. There are perhaps 2,000 criminal courts sitting daily in the U. S.; no more than 20 of these have a regular psychiatric examiner attached to them. In the City of Baltimore you have recently given the medical man a status in one of your courts.

In the Federal military justice, the probationary barracks at Fort Leavenworth have for eight years past had the best kind of psychiatric advice. At our entrance to the war, the Secretary of War sanctioned a plan to assign psychiatric officers to every division for examination of accused men before trial. Owing to the lack of sufficient qualified officers, and to other obstacles, this was not immediately done. But after some time it was achieved in many, if not most, cantonments; and now the records on appeal usually contain a report by the psychiatric officer as a matter of course.

Here the Federal military system has rapidly accepted a measure which still remains unadopted by any State in the Union.

This measure brings us back to the necessity of a centrally directed administration. The psychiatric staff must be organized from State headquarters, because in the rural courts there are not enough criminal cases to require the entire continuous service of one officer, and the staff must therefore go on circuit when and where needed. It remains for the State civilian justice to take this step.

6. *Conclusion.* And so, throughout, we come back to the prime fact, viz., that the most needed measure for State criminal justice today is centralized supervision under a chief judicial superintendent; that this measure not only itself brings vast improvement in efficiency, but that it alone will enable other measure to work well; that the Federal military justice already possesses this and several other features well worth imitation; and that civilian justice is put on the defensive to take a lesson in becoming efficient by adopting these features.

## AN INTERNATIONAL MURDER TRIAL

WILLIAM RENWICK RIDDELL<sup>1</sup>

In 1837 occurred in Upper Canada, what is generally known as Mackenzie's<sup>2</sup> Rebellion: a number of those dissatisfied with the government of the Province, took up arms to subvert it with violence. The Rebellion, although, of course, technically against the young Queen Victoria<sup>3</sup>, was in reality against the oligarchy<sup>4</sup> which ruled Upper Canada with the assistance of the Lieutenant-Governor, the notorious Francis Bond Head—it took by no means so wide a range as the contemporary Rebellion in Lower Canada<sup>5</sup>.

Somewhat ignominiously defeated in December, 1837, at Gallows Hill near Toronto, Mackenzie made his way to Buffalo. There he was received with enthusiasm by crowds: many Americans joined his banner and with Canadian "Patriots"<sup>6</sup> forming a force of some hundreds

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<sup>1</sup>L.L.D., F. R. S. Can., Sc.; Justice of the Supreme Court of Ontario.

<sup>2</sup>William Lyon Mackenzie was a Scotsman born at Springfield, Dundee, Scotland, in 1795; he came to Canada in 1820 and shortly thereafter went into business at Dundas and Queenstown, Upper Canada. In 1824 he began the publication of a newspaper, "The Colonial Advocate," and almost immediately became one of the most important and influential leaders of the Reform or Radical Party. The opposition to the Government became more and more bitter until at length in December, 1837, it broke out in open rebellion. This was put down without delay by the loyal Upper Canadians, but the embers smouldered for nearly two years.

Mackenzie was a "reformer ahead of his time"; but his views have received full recognition. Canada is now in government almost what he wished it to be.

He went to the United States where he suffered imprisonment in the County Goal of Munroe County for 18 months; after the troubles of the Rebellion were over he came back to Upper Canada in 1849 under the general amnesty of that year. He again entered Parliament and was a useful member, but by no means the outstanding leader of former days. He died at Toronto, August 28, 1861.

A full and impartial account of his life and work will be found in his Life, written by his son-in-law, Charles Lindsey—a new edition by George G. S. Lindsey, K. C., Mackenzie's grandson, was published at Toronto, 1909, by Morang & Company.

<sup>3</sup>Queen Victoria came to the throne June 20, 1837, at the age of 18.

<sup>4</sup>Generally called the "Family Compact" from the close family and social relationship of many of its members.

<sup>5</sup>The contemporary Rebellion in Lower Canada arose in great measure from the difference in race, creed and language of the British conqueror and the French-Canadian mass of the population. No such complication existed in Upper Canada; the movement there was wholly political.

<sup>6</sup>All rebels are "Patriots" in their own estimation; it is only when they are victorious that they cease to be traitors.

"Treason doth never prosper. What's the reason?

"Why, if it is proper, none dare call it treason."

of men, they took possession of Navy Island on the Canadian side of the middle line of the Niagara River. There they camped; Mackenzie got a Van Rensselaer<sup>7</sup> to act as Commander; Navy Island was fortified and preparations were made to invade Canada.

While the Washington authorities wholly discountenanced the movement, those of the State of New York were more than lax; arms and munitions of the State came into the possession of the "Patriots" whether stolen from the Batavia Arsenal or by other means we need not here enquire. Navy Island being within cannon shot of the Canadian shore—indeed, only some 600 to 700 yards distant—the "Patriots" subjected it to a desultory bombardment, which caused damage to property and later to life.

The Lieutenant-Governor, Head, complained to Governor Marcy of New York State, but without much satisfaction; he also took prompt measures to meet and defeat the threatened invasion; he sent Col. Allan Napier MacNab<sup>8</sup> to take command of the Niagara Frontier defenses, and MacNab gathered a volunteer and militia force for that purpose.

The "Patriots" derived all their food, munitions, etc., from the United States; these had been carried by rowboats, but on December 28, it was noticed by MacNab and his officers that a steamboat was in the service. This was the "Caroline," a steamboat about 75 feet long with a registered tonnage of 46 tons, the property of William Wells of Buffalo, and worth about \$800. Secured by the bond of a number of substantial Buffalo<sup>9</sup> citizens, Wells had been induced to

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<sup>7</sup>Not the General Van Rensselaer who had led with credit the American invasion of Canada at Queenstown Heights in 1812, but his son, Rensselaer Van Rensselaer who had no merits except personal bravery. He was a confirmed drunkard; and with a kind of drunken cunning he kept all his plans to himself and refused to act or even to explain his intentions to his followers.

<sup>8</sup>Afterward Sir Allan Napier MacNab, Prime Minister of Canada. His name is spelled in various ways—McNab, Mac Nab, Macnab, McNabb, Mac Nabbs, Macnabb.

<sup>9</sup>The Americans who supported the cause of the Canadian Rebels were called "Sympathizers"—a secret society called "Hunters' Lodges" was formed in the United States composed of "Sympathizers," which did not die out for several years and which was as great a nuisance to both countries as the Fenians of later date.

There were several invasions of Canada—three principal invasions of Upper Canada alone by these enthusiasts, all resulting in defeat, and two in the ignominious death by hanging of several of the raiders.

All of these raids purported to be to free Canadians from the "yoke of England"—every invasion of Canada from the south has been ostensibly for that purpose, from that of Benedict Arnold and Montgomery in 1775 through those of Hull, Van Rensselaer, Wierkin and Hampton in the War of 1812, those of the Sympathizers in 1837 and 1838 down to the Fenian Raid of 1866. In every case Canadian troops drove the invaders back—in most cases without the assistance of the regular forces of the empire. Canadians could



use his boat in the work of conveying recruits, goods and arms to Navy Island. She was cut out from the ice at Buffalo and brought down to Fort Schlosser: she plied between the American shore and the Island—at least one cannon, a six pounder, being part of her freight.

Two of the Canadian force, Captain Andrew Drew, a former officer of the Royal Navy, and Alexander McLeod, a Scotsman, Deputy Sheriff of the District of Niagara, rowed round Navy Island under heavy fire, and successfully accomplished the task of determining the movements of the steamer.

All day of the 29th December, her activities were continued: MacNab determined to capture or destroy the *Caroline* and Drew assuring him that he could do this after dark, MacNab gave him orders to do so.

Volunteers were called for "for special service"; more than a sufficient number met at Chippewa Creek about 9 P. M.; seven boats<sup>10</sup> were picked out, each with seven or eight men in addition to the officer in command: information was given of the object of the expedition\* and the men given a chance to withdraw—not a man flinched.

Captain Drew in advance with a port fire over the stern of his boat to guide the others, the flotilla rowed in silence first up the River a little above Whiskey Point and then across between Navy Island and Grand Island. It had been thought that the *Caroline* would be found anchored on the east side of Navy Island in Canadian waters, but it was soon found that she was moored to the wharf at Fort Schlosser on the American side. But the Canadians continued; fired at by the sentry on the boat, they escaped serious injury and at once boarded the steamer. After some fighting whereby one Canadian<sup>11</sup> was crip-

not be got to understand that they were not free or that they were under any yoke. To the cry,

"Hereditary bondsmen, know ye not

Who would be free themselves, must strike the blow?" they answered by striking a blow at the self-styled liberator.

<sup>10</sup>Two of these boats seem to have lost their way; only five participated in the attack.

<sup>11</sup>Lieutenant Shepherd McCormick was shot in several places and received two ugly wounds from a cutlass; he was disabled for life. In the succeeding session by 1 Vic., C. 46, the Upper Canadian Parliament gave him a pension of £100 (400) for life. Richard Arnold who survived in Toronto till 1884 (a ticket agent on the Grand Trunk Railway) was wounded in the arm; and Captain Warren, formerly of the 66th Regiment of Foot, received a trifling injury, not sufficient to keep him from duty next day.

McCormick's name, Christian and surname, is spelled in different ways. I give the orthography of the Pension Statute (1837-8) 1 Vic., C. 46, which has the recital: "Whereas Sheppard McCormick, Esquire, a retired Lieutenant of the Royal Navy, received several severe wounds in action at the capture and destruction of the Piratical Steamer "*Caroline*" in an attempt to invade this province by a lawless Banditti, by which he is disabled, and it is just

pled for life and two others less seriously wounded the Caroline was captured. It was then determined to set fire to her and set her adrift; this was done<sup>12</sup>; and the expedition returned to the Canadian shore. One American, Amos Durfee, of Buffalo, was left dead upon the wharf at Fort Schlosser, a bullet fired at close range having gone through his head from back to front.

They who set the Caroline on fire, nearly set the continent on fire. There arose a controversy which only by the common sense of the two peoples concerned, was prevented from being a conflagration—hot words were uttered on both sides, and war was in the air. Happily the dispute was amicably settled and the peace between the English-speaking peoples was not broken.

The morning after the expedition (as it was subsequently alleged) Alexander McLeod was loud in his boasting of his deeds of prowess the previous night—it was said that he showed a pistol with which he had slain a man and a sword dyed with blood of a "damned Yankee"<sup>13</sup> to more than one admiring auditor.

Long after the Rebellion had failed, November 12, 1840, McLeod went to Lewiston, N. Y., and was there arrested on the charge of murder and arson. He was committed to jail to answer to the charge and February 6, 1841, a true Bill of Indictment for the Murder<sup>14</sup> of Durfee was found against him at the Court of General Sessions of the Peace for the County of Niagara and sent to the Court of Oyer and Terminer for that County. As soon as McLeod's imprisonment became known to the Canadian authorities, the British Minister at Washington, H. S. Fox, demanded his release in the name of the British

and right that he should receive a Pension during such period as he shall be disabled by said wounds."

"Pirates" was the gentlest term applied by Loyalist Canadians to the "Sympathizers"—they were the same kind of "Pirates" as William of Orange and Lafayette, but being unsuccessful, they met the same fate when captured as that other "Pirate," the Duke of Monmouth.

"Let no one gird at 'a banditti'"—for *Rex super grammaticam*.

<sup>12</sup>The common story is that the steamer went over the Falls; this seems to be an error. Those interested should consult "The Story of the Upper Canadian Rebellion," by John Charles Dent, Toronto, 1885, which contains in the second volume a reasonably full and accurate account of the episode.

<sup>13</sup>I give this (following the shorthand report of the trial) as two words: every one has heard of the highborn, delicately nurtured Southern lady who never knew till she was grown up that "Damyantee" is not one word. In Canada the Southern pronunciation was universal.

<sup>14</sup>The form of this indictment will appear later in the text. My account of the arrest and trial of McLeod is almost wholly taken from Gould's Stenographic Reporter, Vol. 2, Nos. 1-5, 1841, Washington, D. C. This contains a full stenographic report of the trial and contains other information bearing upon the case. It seems to be accurate and impartial and I follow it in almost every instance.



Government—this course was approved by the British Government and in March, 1841, Fox made a renewed demand for McLeod's immediate release, as his act was of a public character planned by the responsible authorities of His Majesty's territories: Webster refused to accede to the demand.

A motion was made on behalf of the prisoner; he was brought before the Supreme Court on a writ of Habeas Corpus, but after a full consideration of his case, he was demanded for trial<sup>15</sup>.

The Indictment was traversed and came on for trial at Utica, Oneida County, N. Y., October 4, 1841. It had been expected that there would be a large crowd at the trial on account of the notoriety of the case; and most elaborate and careful arrangements had been made to avoid tumult or confusion; but nothing of the kind appeared. All who desired to be present were comfortably seated and as the reported says, "Persons at a distance who have been wrought up to a feverish excitement on this subject will be astonished at the apparent apathy felt here." Indeed it is noted that on the third day there was not a single spectator present at the opening of Court.

The Presiding Judge was the Hon. Philo Gridley; with him on the Bench, but taking no part and having no voice, were the Local Judges, White, Kimball and Jones; Counsel for the State were Willis Hall (Attorney General), Jonathan L. Woods (District Attorney for Niagara County), Timothy Jenkins (District Attorney for Oneida County) and Seth C. Hawley of Buffalo. For the Prisoner were Joshua A. Spencer (U. S. District Attorney) with Hiram Gardiner and Alvin C. Bradley, both of Lockport. The prisoner sat with his Counsel not at all moved by the strongest evidence against him. The trial lasted eight days and resulted in a speedy verdict of "Not Guilty."

The Indictment was on seventeen counts in the old Common Law form—the first count charging McLeod on a day and at a place named with a certain gun of the value of five dollars then and there loaded and charged with gunpowder and one leaden bullet (which the said Alexander McLeod in his right hand then and there had and held) to, against and upon the said Amos Durfee then and there feloniously and wilfully and of his malice aforethought and with a premeditated design to effect the death of the said Amos Durfee did shoot and discharge, etc., etc., etc.<sup>16</sup> The second count said it was a pistol (instead of a gun); the third that John Mosier killed Durfee with a pistol; the

<sup>15</sup>The arguments, long and learned, are given in Gould. See also the *People v. McLeod* (1841), 25 Wendell, N. Y. 483, S. C., 1 Hill, 377, for the official correspondence, the arguments and judgment.



fourth that persons unknown killed him with a pistol; the fifth that it was Thomas McCormick who killed Durfee with a gun; the sixth that it was persons unknown who used the gun; the seventh charged Rolland McDonald with killing him with a pistol; the eighth, John Mosier with a gun; the ninth, persons unknown with a pistol; the tenth, persons unknown with a gun; the eleventh, persons unknown with certain instruments and deadly weapons to the Jurors unknown; the twelfth, that McLeod and divers persons unknown conspired to injure Wells, seized his steamer *Caroline* in a manner dangerous to the lives of persons, etc., and the deed was done with deadly weapons; the thirteenth, the same but with a gun; the fourteenth, that McLeod in destroying the *Caroline* caused the death of Durfee with a gun; the fifteenth, the same with a pistol; the sixteenth, with "divers instruments, tools and deadly weapons unknown to the Jurors" and the seventeenth, that McLeod conspiring with others unknown to commit arson did commit the crime of murder by killing Durfee "with divers instruments, tools and deadly weapons unknown to the Jurors."

McLeod was charged with being accessory before the fact in counts 3, 4, 5 and 6, with being present aiding and abetting in counts 7, 8, 9, 10 and 11.

So that in the result, McLeod killed Durfee with a gun, a pistol or unknown deadly weapon; Durfee was killed by McDonald with a gun, by Mosier or unknown persons with a pistol or by unknown persons with a gun or deadly weapons, McLeod being present aiding and therefore "principal in the second degree"; or he was killed by Mosier or unknown persons with a pistol, or McCormick or unknown persons with a gun, McLeod being an accessory before the fact.

A jury was obtained without delay, the Attorney General asking<sup>17</sup> each juror as called if he had formed any opinion of the guilt or innocence of the prisoner and if he had conscientious scruples in the subject of giving a verdict involving life. The right of the prosecution to direct a juror to "stand aside" without challenge, always allowed

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<sup>16</sup>The voluminous "Common Law Form" of indictment is now in Canada a curiosity; we simply say: "The jurors for the King present that James Smith murdered John Jones at Toronto on May 17, 1919," and let it go at that. We no longer quash indictments for irregularity, etc. We have no time for technicalities.

<sup>17</sup>A practice wholly unknown in Canada. Four days before the sitting of the court, the prisoner may obtain a copy of the jury panel and make inquiry as to those on the jury. I have never but once in 36 years' somewhat active experience known a juryman asked a question, and that was by a very young barrister who never repeated the offense.

in Canada, was refused by the Court.<sup>18</sup> Only 23 jurors were called, 10 were peremptorily challenged by the prisoner, two were challenged for conscientious scruples as to capital punishment, and one was excused for the same cause—the whole proceeding could not have taken more than an hour.<sup>19</sup>

The evidence for the prosecution proved the destruction of the steamer and the death of Durfee, also (if the evidence were true) the boasts next morning of McLeod and his bloody sword. Some witnesses more or less indefinitely swore to McLeod being among those who came back in the boats. Some thought they saw him in the melee at Fort Schlosser, but no one positively identified him as being there. The case for the prosecution took three days to present, 21 witnesses being called, nearly all of whom seem to have given their evidence in a fair and impartial manner. There was undoubtedly evidence sufficient to justify a conviction, and the defense was called on. Unless the evidence for the prisoner was wholly perjured, it is quite plain that he was not guilty of anything but vainglorious boasting. Sir Allan MacNab and thirteen men who were in the boats, were examined on Commission in Canada; they all swore that McLeod was not amongst the assailants—the reading of those depositions consumed two days. On the sixth day, a former officer of the 79th Highland Regiment who had served under Sir John Moore and the Duke of Wellington was called with his wife and other members of his family. They swore that McLeod had passed the night at their house at Stamford about six miles from Chippewa and that Col. Cameron brought the news of the destruction of the "Caroline" to their house in the morning while McLeod was still there,<sup>20</sup> a tavern-keeper swore that he had taken McLeod from Niagara to Stamford on that evening, and there was other corroborative evidence. After the defense had called eight witnesses to testify *viva voce*, the prosecution replied with six commission witnesses and twelve *viva voce*; their evidence was not of much value.

The seventh day was taken up with the addresses of Senior and Junior Counsel for the defence and Junior Counsel for the prosecu-

<sup>18</sup>The Crown as of right may have in Canada any juryman stand aside, i. e., excuse him until all the rest of the panel has been gone over and a jury not obtained.

<sup>19</sup>The enormous time taken in some American courts to find a jury in a serious criminal case is always a source of wonder and perplexity to Canadians. I have never seen it take more than half an hour in Ontario, even in a murder case.

<sup>20</sup>Some doubt may be cast upon this evidence: McLeod had an intrigue with a daughter of the house.

tion; on the eighth the Attorney-General addressed the Jury and the Judge delivered his charge—all of these were able, logical and fair. The Jury found a verdict of Not Guilty in about half an hour.<sup>21</sup> Thus ended what bade fair to be a most awkward if not an exceedingly dangerous complications.<sup>22</sup> *O si sic omnia.*

<sup>21</sup>The verdict was almost certainly a righteous one.

McLeod's boasting seems well established and yet he was not wholly a Thraso; he played a creditable part in the Battle of Gallows' Hill and seems to have been thought well of by his neighbors. It is not Brigadier Gerard alone who is brave, but unreliable when he comes to relate his own exploits. He was the Deputy Sheriff McLeod who, shortly before this time, in the Fall of 1837, was charged with the delivery at the Ferry to American officers of the runaway slave, Solomon Moseby, charged with stealing his master's horse in Kentucky, to assist him in his flight for freedom, and ordered to be extradited. A large number of negroes lay around the Gaol at Niagara watching for Moseby, and when he was brought forth under armed guard and shackled, they made an attack on the escort. McLeod ordered the guard to resist, two negroes were killed, but Moseby made his escape. Hubbard Holmes, the leader of the rescuing party, a colored preacher and teacher, died in the affray, a martyr as worthy the name as was John Brown, but like the mute, inglorious Milton, unknown to all but a very few. A fairly full account of the Moseby episode will be found in a paper, "The Slave in Upper Canada," read before the Royal Society of Canada, May, 1919.

McLeod seems to have been under the influence of liquor when he made his boasts—in those days of cheap and strong whiskey, drunkenness was the curse of Upper Canada; everything was an excuse for drink.

"There are five reasons why men drink,  
Good wine, a friend, or being dry,  
Or lest you should be by-and-by,  
Or any other reason why."  
(For "good wine" substitute "any kind of whiskey.")

<sup>22</sup>For more than a century the difficulties between the United States and Britain have been amicably, if not always satisfactorily to both parties, arranged by the peaceful means of diplomacy. There is no reason to doubt that had McLeod not been acquitted, means would have been found to settle the matter in such a way as to avoid war. Arbuthnot and Armbruster, Mason and Slidell, the Leopard, the Alabama, all failed to break the peace which has so blessed the English-speaking world. May it extend *in multos annos, yea in returnum.*



# INSANITY AND CRIMINAL RESPONSIBILITY

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## (REPORT OF COMMITTEE "A" OF THE INSTITUTE)

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VICTOR P. ARNOLD, Chairman<sup>1</sup>

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The central idea which this committee has had in mind in preparing this report may be expressed by saying that in the consideration of mental abnormality as a factor in the causation of crime, it is necessary to realize that there are forms of mental abnormality other than insanity and feeble-mindedness (as these terms are generally understood) which must be taken into account.

That a very considerable proportion of delinquency is associated with mental abnormality is very strongly emphasized by army experience during the war. When it was found necessary to raise a large army the disciplinary authorities were requested to estimate the number of delinquents for whom it would be necessary to provide accommodation when the army was increased to three million men.

Using the experience of previous war and peace armies it was officially estimated that the disciplinary barracks would be called upon to care for 50,000 prisoners. As a fact, with an army considerably in excess of three million men, the total number so confined was approximately 5,000.

Doubtless many factors entered into the consummation of this remarkable result, but the one which we would emphasize is the exclusion of men presenting mental disability of any kind. In this connection it must be remembered that in previous armies the obviously defective and insane were eliminated and hence that the additional exclusions, based upon more expert psychiatric study, represent, in large degree, persons who had succeeded thus far in civil life without giving evidence of marked anomaly.

Studies of prisoners in civil penal institutions, especially of recidivists, reveal a large proportion of persons showing mental anomalies similar to those upon which exclusion from military service was based.

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<sup>1</sup>The personnel of this Committee is as follows: Victor P. Arnold, Chairman, Judge of the Juvenile Court, Chicago; Dr. Hugh T. Patrick, Chicago; Dr. H. Douglas Singer, State Alienist, Kankakee, Ill.; Dr. Sidney Kuh, Chicago; Burdette G. Lewis, Commission on Charities and Corrections, Trenton, N. J.

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Official Organ of the American Institute of Criminal Law and  
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of the American Society of Military Law

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<sup>31</sup>*Ariz.* Revised Statutes, 1913 (Civil Code), sec. 3562.

<sup>32</sup>*Conn.* 1917, C. 308, sec. 4.

<sup>33</sup>*Idaho.* 1911, C. 159, sec. 152, amended 1917, C. 84.

<sup>34</sup>*Minn.* 1917, C. 397, sec. 1.

<sup>35</sup>*Miss.* 1916, C. 111, sec. 6.

<sup>36</sup>*Neb.* Revised Statutes, 1913, sec. 1263.

<sup>37</sup>*Nev.* Revised Laws, 1912, sec. 728.

<sup>38</sup>*N. C.* 1915, C. 222, sec. 2.

<sup>39</sup>*N. D.* Compiled Laws, 1913, sec. 11402.

<sup>40</sup>*Ohio.* General Code, secs. 1642 and 1643, amended 1913, p. 864.

<sup>41</sup>*Oreg.* Lord's Oregon Laws, 1910, sec. 4406.

<sup>42</sup>*S. C.* 1917, No. 73, sec. 1; 1912, No. 429, sec. 1.

<sup>43</sup>*S. D.* 1915, C. 119, sec. 1.

<sup>44</sup>*Utah.* 1913, C. 54, sec. 2.

<sup>45</sup>*Va.* 1914, C. 57. (Dependent under 16.)

<sup>46</sup>*Wash.* 1913, C. 160, sec. 1.

<sup>47</sup>*W. Va.* 1915, C. 70, sec. 1, amended 1917, C. 63.

<sup>48</sup>*Md.* 1916, C. 326, sec. 2. (In Baltimore, under 16.)

<sup>49</sup>*Cal.* 1915, C. 631a, secs. 1 and 5, amended 1917, C. 627 and C. 634.

<sup>50</sup>*Ala.* General Laws, 1915, No. 506.

## CRIMINAL LAW IN UPPER CANADA A CENTURY AGO

WILLIAM RENWICK RIDDELL<sup>1</sup>

When examining for another purpose the original manuscripts in the Archives at Ottawa of the dates shortly before and at the time of the War of 1812-14, I perused many original reports from assize judges<sup>2</sup> and other documents of an interesting character from the point of view of criminal law.

<sup>1</sup>LL.D., F.R.S. Can., etc., Justice of the Supreme Court of Ontario.

<sup>2</sup>While after the formation of the province there seems to have been no statutory or other obligation of a legal nature upon them so to do, it was the custom from the beginning of the separate provincial life of Upper Canada in 1792, as before, for the trial judges to make a report to the lieutenant governor upon every capital case in which a conviction was made and the prisoner sentenced to death.

In 1841 by the Act (1841) 4, 5, Vic., C. 24 (Can.), it was enacted, sec. 32, that from and after January 1, 1842, it should not be necessary that reports should be made to the governor in the case of a prisoner convicted and sentenced to death, "any law, usage or custom to the contrary notwithstanding." Thereafter it was not the custom to report unless a report was called for by the government.

Two years after the formation of the Dominion of Canada, the Act (1869), 32, 33 Vic., C. 29 (Dom.), by sec. 107, continued the provision of the Act of 1841, but added that if the judge thought that executive clemency should be extended to the prisoner, or if there were a point of law reserved in the case still undecided, or "from any other cause it becomes necessary to delay the execution," the prisoner might be reprieved for a sufficient time.

Four years thereafter, by the Act (1873), 36 Vic., C. 3 (Dom.), it was enacted that "the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the secretary of state of Canada for the information of the governor; and the day to be appointed for carrying the sentence into execution shall be such as in the opinion of the judge will allow sufficient time for the signification of the governor's pleasure before such day. . . ." This was carried into the Consolidated Statutes of Canada (1886), C. 181, sec. 8, into the Code of 1892, 55, 56 Vic., C. 29, sec. 937, and now appears in the Criminal Code (1906), C. 146, sec. 1063. In quoting statutes, our custom is to refer them to the year of the reign of the sovereign, thus: "30 Geo. III" means in the 30th year of the reign of King George the third. Sometimes a parliamentary session takes up part of two years of the reign, in which case, terminology, such as "35, 36 Vic." is used. This means in the session of Parliament holden in the 35th and 36th year of the reign of Queen Victoria. For practical purposes, the lawyer need remember only the dates of the accession of George III, George IV, William IV, Victoria, Edward VII, and George V, all of whom, except Queen Victoria, had the prudence to come to the throne in a decimal year; the dates are, therefore, easily remembered, 1760, 1820, 1830, 1837, 1900, and 1910.

As the Imperial Parliament continued to pass legislation affecting Canada, it is often necessary to distinguish the different legislative bodies; for that reason the contraction (Imp.) is generally added to Imperial legislation; (U. C.) indicates legislation by the Parliament of Upper Canada; (L. C.) that of Lower Canada, both of which continued from 1792 to 1841; (Can.) that of the Province of Canada, which consisted of a union of the two provinces of Upper and

and criminal cases sat is remarkable; notwithstanding the invasions at the Detroit, Niagara and St. Lawrence Rivers, the taking of the capital, York (now Toronto) with the wanton destruction of the Parliament and other buildings, the burning of Fort George, Port Dover, etc., no trace of actual warfare appears in the courts except an occasional reference to the necessity, actual or probable, of the court sitting at some place other than the usual one and the necessity of removing prisoners from a goal likely to be taken by the enemy to one more safe.

But the present paper is intended to deal with the state of the criminal law as appearing from proceedings in court.

The criminal law of England was introduced into the old "Government of Quebec," which contained the eastern part of what was afterwards Upper Canada, by the royal proclamation of October 7, 1763<sup>3</sup>; and the Quebec Act of 1774<sup>4</sup> extended it to all the territory of that province and much more. To make it the more abundantly clear that this was the law of Upper Canada, the Parliament of the young province which had by its very first statute in 1792 introduced the English civil law, eight years later by the statute of (1800) 40 Geo. III, c. 1. (U. C.) expressly provided that the criminal law of England as it stood on September 17, 1792, should be the criminal law of the province, subject to any ordinance of the former Province of Quebec made after the Quebec Act of 1774.

The first class of case to be noticed is the most common in our English speaking countries—larceny. At the common law of England in 1792 and later there were petty (petit) larceny and grand larceny, the former being of property of value not more than twelve pence, the latter of property of value more than twelve pence—the punishment for grand larceny being death by hanging. "It is true," as Blackstone sententiously says, "that the mercy of juries will often make them strain a point and bring in larceny to be under the value

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Lower Canada, and continued from 1841 till the formation of the Dominion of Canada in 1867; the legislation of the Dominion of Canada is indicated by the contraction (Dom.).

<sup>3</sup>This proclamation will be found in convenient form in Short and Doughty, *Constitutional Documents, 1759-1791*, published by the Dominion Archives, pp. 119, sqq. Also in the fourth report of the Ontario Bureau of Archives (1906), pp. 2, sqq. The original western boundary of the Government of Quebec was a straight line drawn from the south end of Lake Nipissing to where the present international boundary crosses the St. Lawrence.

<sup>4</sup>(1774) 14 Geo. II, C. 83 (Imp.). A copy will be found in Short and Doughty, *ut supra*, pp. 401, sqq. By this act, Quebec included all the territory now the Provinces of Quebec and Ontario and also the British territory west of Pennsylvania to the Mississippi and south to the Ohio.



of twelve pence when it is really of much greater value; but this is . . . a kind of pious perjury."<sup>5</sup>

Before Upper Canada was formed an ordinance had been passed by the Governor and Legislative Council<sup>6</sup> at Quebec, April 30, 1789, whereby petty larceny was extended to the value of twenty shillings sterling, and corporal punishment might be adjudged against the petty larcener.<sup>7</sup>

The extraordinary severity of the common law in cases of grand larceny had been modified in England by the practice of the courts and by legislative provisions. One such modification was the well-known "benefit of clergy," which was originally the privilege allowed to a clerk in holy orders upon being accused of crime in a civil court to be turned over to his ecclesiastical superior. This privilege was in course of time extended to all who could read and many a rascal escaped hanging because he was said to be able to read a verse in the Bible, "his neck verse" as it was sometimes called. Then the invidious distinction between the criminal who could and him who could not read was abolished and all men were put on the same pleasant footing—even women were allowed to claim the "benefit of the statute" as men the "benefit of clergy."<sup>8</sup> The law then was that no larceners,

<sup>5</sup>Blackstone's Commentaries, Bk. 4, p. 238.

<sup>6</sup>From the Royal Proclamation of 1763 until the formation of the two Provinces of Upper Canada and Lower Canada, 1792, the country was governed by a governor at Quebec, assisted by a legislative council nominated by the Crown. The proclamation contemplated and provided for an elective house of assembly, but the scheme was not carried out; and the Quebec Act of 1774 provided for a legislative council only. After the country was divided into two provinces, the Canada or Constitutional Act (1791), 31 Geo. III, C. 31 (Imp.), provided for two houses, the legislative council, nominated by the Crown, and the house of assembly, elected by the people in each province.

<sup>7</sup>The ordinance (1789), 29 Geo. III, C. 3, published in the Quebec Gazette, May 7, 1789. These ordinances are published in thin quarto volumes, are very rare, and met with as a rule only in law libraries; the Canadian Archives Department has published them in convenient form as Sessional Papers, 1914, No. 29b, and 1916, No. 29a; the ordinance referred to in the text will be found in Session Papers, 1916, No. 29a, pp. 225, sqq.

<sup>8</sup>Originally the tonsured clerk was delivered over by the civil judge to the bishop to be dealt with. This was generally, but not always, after conviction, and it was notorious that seldom was there any severe punishment meted out to the erring clerk. Gradually, by the practice of the civil courts, everyone who could read, whether or not he was tonsured or in holy orders, had the same privilege. But in 1487, by 4 Hen. VII, C. 13, the layman was prevented from pleading his clergy effectively more than once, and when he did plead his clergy he was branded on the left thumb (in later times on the left cheek). After some other legislation, it was in 1576 enacted, by 18 Eliz., C. 7, that after conviction and burning the convict should not be delivered to the bishop, but either after or without imprisonment, not exceeding one year, he should be discharged. Women obtained a similar privilege, but they might be imprisoned, whipped, or put in the stocks. In 1706, the statute, 5 Ann, C. 6, gave everyone, illiterate, as well as literate, the right to the benefit of clergy, and lengthened the term of imprisonment which might be imposed; and it was, by

grand or petty, could on a first conviction be put to death, but could be transported, whipped, fined and imprisoned.

It was, however, manifest that transportation was in Upper Canada practically impossible, and consequently in 1800 by the Provincial Act of 40 Geo. III, c. 1. sec. 5 (U. C.), it was provided that banishment from the province should take its place.

We find at one assizes one larcener to be imprisoned for three months, another to be imprisoned for one month and publicly whipped twice, thirty-nine lashes each time.<sup>9</sup>

There were, however, certain larcenies which had a higher degree of guilt than ordinary larceny, and in the case of which Parliament penalized the offender by denying him the benefit of clergy—among such was stealing in a dwelling house to the value of forty shillings.<sup>10</sup> In these non-clergyable offenses the penalty of death was imposed.<sup>11</sup>

At York (now Toronto) an unfortunate man was convicted of stealing a sum of money in a dwelling house and was sentenced to death, but the chief justice was so impressed with the circumstances of the case that he granted a reprieve and reported in favor of a pardon.<sup>12</sup> There was necessity for a reprieve by the judges, as normally without such respite the culprit would be hanged the next day but one after his sentence.<sup>13</sup>

(1717) 4 Geo. I, C. 11, and (1719) 6 Geo. I, C. 23, enacted that larceners, grand or petit, instead of being branded, might be transported to America; in 1779 the Act 19 Geo. III, provided that instead of branding, the court might impose a fine and might order the offender to be whipped. This last act, however, was after the Quebec Act, and consequently was not introduced into Upper Canada by the general words of (1800) 40 Geo. III, C. 1, sec. 1 (U. C.), already referred to; but this act, by sec. 3, made similar provisions as the Imperial Act of 1779.

<sup>9</sup>Assizes at Kingston, August 30, 1813, before Mr. Justice (afterwards Chief Justice Sir William) Campbell—the Report of John Small, Clerk of the Crown, Can. Arch., Sundries, U. C., 1813. John B. Soucier escaped the lash, but Benjamin McCallister was not so fortunate.

<sup>10</sup>At the common law there seems not to have been any distinction in larcenies between simple and mixed larcenies (such as stealing in a dwelling house) in their effect; but a long and curious series of enactments had been effective in that sense—the only one to be referred to here is (1713) 12 Ann St. 1, c. 7, which contains the provision mentioned in the text.

<sup>11</sup>"Benefit of Clergy" was abolished in England in 1827 by sec. 6 of the Criminal Act of that year and in Upper Canada in 1833 by 3 Will. IV, C. 3, sec. 25 (U. C.).

<sup>12</sup>Lewis Lyons was convicted at York (now Toronto) in November, 1814, before Chief Justice Thomas Scott, of stealing a sum of money in the dwelling house of Harklan Lyons, but pardoned on the recommendation of the trial judge. Can. Arch., Sundries, U. C., Sept.-Dec., 1814.

<sup>13</sup>At the common law the sheriff was to execute the condemned within a convenient time, but in 1742, the statute 25 Geo. II, C. 37, directed that the judge should direct execution the next day but one after the sentence.

In 1841 the Parliament of the Province of Canada enabled the judge to



Unconditional pardons were seldom granted—the course ordinarily pursued was to grant a pardon conditional upon the offender removing himself out of the province and all other British possessions for the term of his natural life.<sup>14</sup>

In England one suing out a pardon was chargeable with fees; but when the Provincial Secretary in Upper Canada made a claim for such fees the Lieutenant Governor peremptorily forbade the payment of any but the nominal fee of six shillings (\$1.20).

A crime not unlike larceny sometimes was committed in the province during war times owing to the great demand for beef—that of killing cattle with the intent of stealing the carcass. This at the common law was a civil trespass only; but in 1741, the Act of 14 Geo. II, c. 6, made killing sheep or other cattle with intent to steal the carcass a felony punishable with death without benefit of clergy. In 1812 a man who had conspired with two soldiers to kill cattle and sell the beef to the army was convicted of an offense under this act. The trial judge reprieved the convict and recommended a conditional pardon, which was granted.<sup>15</sup>

The same act made it a felony without benefit of clergy to steal cattle: a young man convicted in 1811 of stealing a "heiffer" was under this act sentenced to death, but on the recommendation of the

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have the sentence recorded instead of being pronounced in open court (1841), 4, 5 Vic. C. 24, sec. 33 (Can.); by the Dominion acts (1869), 32, 33 Vic., C. 29, and (1873), 36 Vic., C. 3, a change was made whereby the trial judge was directed to fix a day for the execution sufficiently remote to allow the signification of the governor's pleasure to be made—that is substantially the present law.

<sup>14</sup>Banishment for crime came to an end in Canada in 1842 on the passing of the statute 6 Vic., C. 5 (Can.), which, by sec. 4, enacted that instead of transportation or banishment there should be imprisonment in the provincial penitentiary or other prison.

<sup>15</sup>In 1809, Roger Conat, convicted of perjury at the Newcastle Assizes, and John Silverthorne, convicted at Niagara of some crime (which is not explicitly mentioned, but which was apparently a crime against the person), were to receive pardons. William Jarvis, the provincial secretary, shamefully ill-paid, wrote, October 20, 1809, to William Stanton, secretary to Lieutenant-Governor Gore, that before Lieutenant-Governor Hunter had remitted them, the fees on a patent or charter of pardon were £3.10.0 to the lieutenant-governor, £2.0.0 to the attorney general, and £1.3.0 to the provincial secretary, but that Hunter had remitted all the fees except 6 shillings to the secretary. Jarvis pointed out that both Conat and Silverthorne were wealthy farmers and could well afford to pay the patent fees; Gore, however, made the curt memorandum "to be refused any fee." Can. Arch., Sundries, U. C., 1809.

<sup>16</sup>James Moody was the culprit, and he was convicted before Mr. (afterwards Chief) Justice Powell at the Sandwich Assizes in the fall of 1813. The trial judge reported, September 23, 1813, that this was the first case of the kind in the province, that this country did not seem to require the security of such a severe statute, that the soldier conspirators had been removed from the cognizance of the civil authority and had remained unpunished. He left a reprieve and recommended a pardon, which was granted, Can. Arch., Sundries, U. C., 1813, July-December.



trial judge received a pardon conditional on perpetual exile from the province and all other British territory.<sup>17</sup>

It may be said generally that the punishment of death was not inflicted in cases of theft or the like—even horse-stealing, unless accompanied by circumstances of aggravation, was not visited capitally.<sup>18</sup>

But the case was different with arson. This crime was always looked upon with abhorrence by the law—even the ancient Saxon law made it punishable with death; legislation in the time of Henry VI made it high treason, and the benefit of clergy was taken away in 1531 by 23 Henry VIII, c. 1., and this denial, though revoked in 1547, was made effective again by implication in 1557, and expressly in 1723 by 9 Geo. I, c. 22, the well-known Waltham Black Act. Arson, so far as I can discover at and before the times now under consideration, was always punished with death; and while the executive became more merciful it was not until 1841 that arson became punishable only with imprisonment.<sup>19</sup>

In 1813 at the fall assizes for the London District an unfortunate man was convicted of arson and "left for execution"—"his crime being fully proved and confessed . . . rendered him a fit subject for example."<sup>20</sup>

Burglary also was punishable with death. The second reported criminal trial in the Province of Upper Canada took place at L'Assomption (now Sandwich) in September, 1792, when a negro was convicted of burglary in a house at Detroit and condemned by William Dummer Powell to be hanged.<sup>21</sup> The death penalty continued

<sup>17</sup>George Windeker was at the Niagara Falls Assizes, 1811, convicted before Mr. Justice Powell of stealing a "heiffer," but recommended to mercy by the jury. The judge pointed out in his report that he had before this offense borne a good character and that his connection was reputable—he advised commutation of the sentence to perpetual banishment, "which may be done by a conditional pardon." *Can. Arch., Sundries; U. C.*, 1811.

<sup>18</sup>The attorney general of Upper Canada, John Beverley Robinson (afterwards Sir John Beverley Robinson, Bart., Chief Justice), when the troubles arose concerning the removal of Mr. Justice Willis in 1828 was able to say officially that there had been no executions for simple horse-stealing during his time.

<sup>19</sup>By the Act of (1841) 4, 5 Vic., C. 26, sec. 3 (Can.), arson became punishable by imprisonment for the natural life; but even by that act, sec. 1, if any person were within the house, the punishment was death; and it was not till 1869 that arson under such circumstances was relieved from the death penalty (1869), 32, 33 Vic., C. 22, sec. 2 (Dom.).

<sup>20</sup>The words quoted are taken from the report of Mr. Justice Powell; the name of the convict was David Micken; date of the report, September 23, 1813, *Can. Arch., Sundries, U. C.*, 1813, July-December.

<sup>21</sup>The court at which the negro burglar, Josiah Cutan, was condemned, was a Court of Oyer and Terminer and General Gaol Delivery for the District of Hesse, sitting at L'Assomption. At that time, and until 1796, Detroit and

to be inflicted or at least directed for burglary until 1842, and if the burglary were with intent to murder or wound any person until 1869.<sup>22</sup>

I find no record of a conviction for burglary, but a very serious instance of this crime accompanied with robbery by violence once came under investigation—the offenders were not arrested, however.<sup>23</sup> Had the burglars been arrested and convicted they would undoubtedly have been hanged.

One case of perjury has already been referred to in note 15 *supra*—it seemed to Chief Justice Scott, however, that the accused had simply made a mistake and he recommended an unconditional

Michilimackinac, with certain portions of the present Michigan, were *de facto* part of the Province of Upper Canada, although *de jure* United States territory under the Treaty of 1783. By sec. 4 of the ordinance of April 30, 1789, 29 Geo. III, C. 3 (still in force), it was enacted that "In all trials to be had in either of the new districts (i. e., the Districts of Lunenburg, Macklenburg, Nassau, and Hesse, afterwards in Upper Canada, and Gaspé, afterwards in Lower Canada) before Commissioners of Oyer and Terminer or General Gaol Delivery when the Chief Justice . . . may happen not to be one the execution of the sentence or judgment of the court shall be suspended until the pleasure of the governor . . . shall be signified therein by warrant."

No record is to be found that mercy was extended to Cutan, and, apparently, he was executed.

This is the first sittings of a superior criminal court in Upper Canada of which we have any record—the original is in the Ontario Archives.

<sup>22</sup>See (1841) 4, 5 Vic., C. 24, secs. 14, 15 (Can.), and (1869) 32, 33 Vic., C. 21, secs. 38, sqq. (Can.).

<sup>23</sup>This made a great sensation at the time and subsequently came up in Parliament. Mr. Isaac Swazey, a member of the House of Assembly, who was Inspector of Licenses, and therefore Collector of License Fees for the District of Niagara, and who was also Collector of Municipal Taxes of his township, being in his house on Saturday night, January 21, 1806, heard, about 11 p. m., his door broken open, and was at once assaulted and severely injured by the burglar who entered with two companions—they took away three bags of money containing £178.58¼ of public money and some of Swazey's own. This was Swazey's story; but it must be said that there was some incredulity expressed both by his neighbors and by certain members when the matter afterwards came up in Parliament: The magistrates met, searched all suspicious places and examined suspicious characters without success. In the Parliament which met the following month, nothing was said concerning the loss; but in the next session, beginning February, 1807, Swazey petitioned to be relieved. The bill passed its second reading, but after the committee of the whole had reported recommending that the consideration be postponed until the next ensuing session and the report had been adopted by a vote of 10 to 5, Swazey obtained leave to withdraw his petition, which he did. He petitioned the new Parliament (of which he was not a member) in 1811 for relief, but leave was refused to bring in a bill for that purpose and the matter dropped. See Hamilton's letter to the Administrator of the Government, Grant, January 28th, 1806, Can. Arch., Sundries, U. C., 1806; the proceedings in the Parliament of Upper Canada will be found in Eighth Report of the Ontario Archives (1911), pp. 152, 154, 159, 160 (where the division list appears), 434.

For some account of Swazey, see my article in 33 Canadian Law Times (1913), pp. 22, 96, 180—he had been a noted scout or spy on the loyalist side during the revolutionary war, and came to Niagara after its close. He frequently claimed to have taken part in the abduction of Morgan, who had disclosed Masonic secrets, but this was admitted by him to be untrue when proceedings were about to be taken against him.



pardon which was granted.<sup>24</sup> At that time perjury (being only a misdemeanor and not a felony) was punishable by fine, imprisonment, banishment and pillory—the pillory was abolished in 1841 by 4, 5, Vic. c. 24, s. 31 (Can.), and banishment in 1842 by 6 Vic., c. 5, s. 4 (Can.). Forgery also was not a felony at the common law, but many statutes had made certain forms of it felonies punishable with death—the only one of the English statutes I refer to here is that of 1729, 2 Geo. II, c. 25, which made the forgery of a bill of exchange, promissory note, etc., a felony, and the penalty death without benefit of clergy. The punishment, as is well known, was almost invariably, pitilessly inflicted so long as the statute book was thus disfigured. And so the fate of one poor unfortunate at York was sealed.

Leaving this class of forgery which presents nothing of peculiar interest, another kind may be noted. In 1809 a number of forged ten-dollar notes of the Columbia Bank, an American institution, were in circulation near the Niagara frontier. The bank, through its attorney, brought the matter to the attention of the Attorney General of Upper Canada, William Firth. He at once made investigation, June 22, 1809, and evidence was discovered that some at least of the forgers were resident in the Niagara District; the Attorney General himself went to Niagara to conduct the prosecution, and the first question was as to the form of the indictment. The Act of 1697, 8, 9 Wm. III, c. 20, covered only Bank of England notes, while that of 1729, 2 Geo. II, c. 25, broad as it was and general in its terms, was considered not to apply to these notes. Accordingly the five accused persons were charged with conspiracy to defraud; they were found guilty and sentenced to six months' imprisonment, the "pillory," a fine of £20 each and imprisonment until the fine was paid, and until they found securities for good behavior for two years.<sup>25</sup>

<sup>24</sup>The name is given throughout the proceedings as Roger Conat—I have reason to believe that the real name was Conant—Chief Justice Scott's report and the proceedings concerning the pardon are in *Can. Arch.*, *Sundries*, U. C., 1809, July-December.

<sup>25</sup>Charles Norton, alias Philander Noble, William Smith Crane, Levi Kemble Roberts, Samuel Spring, and Joseph Harris, tried before Mr. Justice Powell at the Niagara Falls Assizes, 1809, and sentenced as stated in the text. They afterwards petitioned the governor, representing their inability to pay the fine, and said that the sentence, if enforced, meant imprisonment for life. The governor "in complaisance to a foreign government (i. e., the United States) declined to remit any part of the direct punishments"; but when the prisoners had put in the six months' imprisonment and stood in the pillory, the magistrates of the district urging on the governor that there was great fear of an attempt at escape, especially as the commandant at the neighboring Fort George had removed the military guard from the gaol, and Mr. Justice Powell recommending that course, the governor without remitting the fine of £20 each, remitted the imprisonment, May 2, 1810. *Can. Arch.*, *Sundries*, U. C., 1809, January-June. *Do. do.*, 1810, January-June.



It was not until the Forgery Act of 1847, 10, 11 Vic., c. 9 (Can.), that forgery of foreign bank notes, etc., was put on the same footing as forgery of domestic notes—by the same act imprisonment was substituted for the death penalty.

A class of offenses not unlike the last in some respects called for the interposition of the legislature. The expense of the war had to be paid almost wholly by "army bills," payable by the paymaster of the forces in Lower Canada. These bills were always at a discount—sometimes a considerable discount—in Upper Canada for obvious reasons.<sup>26</sup> The legislature in 1813 by the Act 53 Geo. III, c. 1. (U. C.), made them legal tender in payment of duties, taxes, etc., and by the same Act s. 2, enacted that the forging of an army bill or uttering a forged army bill should be a felony punishable with death without benefit of clergy. The act was to continue in force only one year and then until the end of the next session of Parliament.

In the fall of 1813 it came to the knowledge of the government that forged army bills were being circulated in the eastern district. Mr. (afterwards Mr. Justice) Jonas Jones, then a barrister at Elizabethtown, was retained to collect evidence, and at the fall assizes of the following year, 1814, a young man was tried at Brockville before Mr. Justice Campbell for uttering a forged army bill for \$25 in a shop in that town. Being convicted, he was sentenced to death; but in the end he escaped this punishment.<sup>27</sup>

<sup>26</sup>For example, when the justices of the Court of King's Bench presented their memorial, January 10, 1814, to the governor, they pointed out that there was a discount of 20% on the army bills. The memorial is interesting at the present time, as it shows that during and by reason of the war—the necessities of life doubled in price—they give the following table:

	Before the War	Now
Bread .....	1 shilling (20 cts.)	2 shillings
Beef .....	6 pence (10 cts.)	1 shilling
Wood .....	7s. 6d. (\$1.50)	15 shillings

They also point out that of every £100 of their nominal salary, they receive in cash only £52.13.0, thus:

Nominal salary, payable in England.....	£100. 0.0
Income tax, 10%.....	10. 0.0
	£ 90. 0.0
Commission on £90 at 2½%.....	2. 5.0
	£ 87.15.0
Discount on exchange, 25%.....	21.18.9
	£ 65.16.3
Depreciation on army bills, 20%.....	13. 3.3
	£ 52.13.0
Net receipts .....	£ 52.13.0

Can. Arch., Sundries, U. C., 1814, January-June.

<sup>27</sup>Duncan Campbell, the son of a major in the army and of respectable family, tendered a forged \$25 army bill to Henry Jones in his shop at Brock-

Another statutory crime of a less heinous nature may be mentioned here, i. e., performing the marriage ceremony without having legal qualifications for that function.

Until the Act of 1793, 33 Geo. III, c. 5 (U. C.), marriages in this province could be validly celebrated only by clergymen of the Church of England (except possibly between Roman Catholics by a priest of their church); that act enabled every justice of the peace to perform the ceremony until there should be five clergymen of the Church of England in his district; in 1798 the Act 38 Geo. III, c. 4 (U. C.), enabled the Church of Scotland, Lutheran and Calvinist ministers to marry members of their own congregation or communion after having obtained a qualifying certificate from the Court of Quarter Sessions. There is a record of a Baptist minister being prosecuted for acting as celebrant minister at a marriage and there are traditions of Methodists having the same fate.<sup>28</sup>

The only instance brought to light in the times now under consideration was that of a "preacher to the Low Dutch" in the Township of Fredericksburg, complained of in 1811 by the Anglican cler-

ville. On being arrested, he said he got the bill from one Hamblin, who was thereupon at once arrested, but later escaped to the United States, where he remained permanently.

True patriot he, for be it understood,  
He left his country for his country's good.

Hamblin, when under arrest, said he had got a number at a large discount from a man in Ogdensburgh, who represented that they had been taken by the American army on its capture of York in 1813.

The trial judge, Mr. Justice Campbell, submitted the convict's case without comment or recommendation. Enormous petitions poured in from the eastern district, and the acting attorney general, Mr. (afterwards Sir) John Beverley Robinson, represented to the governor that he did not think Campbell knew that the offense was capital, that the evil had ceased, and that he hoped executive clemency would be extended to the culprit. A pardon was prepared, but before it had been completed, Campbell escaped from the gaol, and made his way to the United States. *Can. Arch., Sundries, U. C., 1813, 1814.*

The gaols of the province were, at that time, insufficient and insecure, and escapes were very common; prisoners were chained for the sake of security, and shocking dungeons were to be found in some gaols, e. g., that of the Newcastle District, which Mr. Justice Powell in vain endeavored to get the grand jury to present in the fall of 1814, "a cell . . . is the only secure place in the building and if so without fire"—the grand jury in place of finding a presentment against their district found a bill against the gaoler for a negligent escape.

<sup>28</sup>John Wilson, June 7, 1801, pretended to solemnize marriage between Paul Marin of York, baker, and Jane Butterfield of the same place, spinster (otherwise called Jane Burke); on July 14, 1802, an information was filed against him in the Court of King's Bench; the Methodist ministers alluded to were Rev. Isaac B. Smith, Rev. Henry Ryan, and Rev. Joseph Sawyer. See my articles in the 33 *Can. L. Times*, already referred to. What I have called the Statute of 1798 was really passed in 1797, but reserved for the King's pleasure; the proclamation bringing it into force was promulgated December 29, 1798, and the act is always cited as 38 Geo. III, C. 4 (U. C.).

gyman nearest to him as being "again at his old practice of marrying unlawfully." It does not appear that proceedings were taken on this occasion against the offender, but two years before the same minister and another had been prosecuted under the statute.<sup>29</sup> Marrying without legal qualification was a misdemeanor punishable with fine and imprisonment.

In 1830 by the Act of 11 Geo. IV, c. 36 (U. C.), the power of celebrating marriages was further extended to Presbyterians, Methodists, Congregationalists, Baptists, Independents, Menonists, Tunkers and Moravians, the minister to take out a certificate from the Quarter Sessions; in 1857 the Act 20 Vic., c. 66 (Can.), gave the power to ministers of every denomination; in 1896 the Act 59 Vic., c. 39 (Ont.), gave the power to the elders, etc., of the Disciples and the Salvation Army, while Quakers are specially provided for.<sup>30</sup>

Offenses against the person were very common in Upper Canada, due in some degree to the prevailing habits of intemperance. Probably in no country in the world was drunkenness more prevalent until well after the middle of the nineteenth century.<sup>31</sup> Whisky was cheap and abundant and the use of it even to excess was considered an amiable eccentricity. Indeed in most circles the teetotaler was looked upon with pity, not unmingled with contempt as a weakling

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<sup>29</sup>July 20, 1809, instructions were given by the governor to the attorney general, William Firth, to "institute proceedings against Mr. McDowall of Earnestown for solemnizing marriages illegally, and Reuben Beagle of the same place for the same offense." Can. Arch., Sundries, U. C., 1809. The complaint of the Rev. John Langhorne to Governor Gore from Earnestown, January 4, 1811, referred to in the text, gives information that "Mr. McDonald, the preacher to the low Dutch, has been again at his old practice, marrying unlawfully"; and says that he had performed the ceremony of marriage December 11, 1810, between John Philips and Polly Defoe (daughter of Samuel Defoe), both of Fredericksburg and not of his religion. (As a preacher of the low Dutch, i. e., the Dutch originally from Holland, he was probably a "Calvinist," and might, therefore, marry those of his own religion.) The complaining clergyman gives the names of witnesses, but declines to be himself prosecutor or witness, and closes his letter, written in very beautiful script, with the enthusiastic words "God bless the protection of old England as to its clergy and the Defender of the Faith, Amen and Amen." Can. Arch., Sundries, U. C., 1811. Gore was by no means so strong a churchman as Simcoe, and he was having much trouble with Firth, the attorney general. Firth was succeeded in the same year by the young John Macdonell as acting attorney general, who was to meet a hero's death with his general, Isaac Brock, on that October day in 1812, never to be forgotten by Canadians.

<sup>30</sup>But a man cannot make a church of his own and becoming its minister, celebrate marriage, *Rex v. Brown* (1908), 17 O. L. R. 197.

<sup>31</sup>The great temperance wave which passed over the continent of North America had a tremendous effect in this province. Lodges of Sons of Temperance, Good Templars, etc., were held in almost every school-house, and while the older generation may have been little affected, the young were brought up in the ways of total abstinence.



if not a hypocrite.<sup>32</sup> During the war it was suggested that the distillation of all grain should be forbidden, but that was to prevent the price of grain being unduly raised by its purchase by distillers and the consequent scarcity of food, not at all to prevent the people from using whisky. Indeed, the prohibition was not brought into force lest the army should not have enough of what was thought to be an absolute necessity.<sup>33</sup>

Most of the time of the Courts of Quarter Sessions<sup>34</sup> was taken up with cases of assault and battery; but an occasional case of the kind appeared at the assizes. Those found guilty of assault or assault

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<sup>32</sup>Readers of Charles Dickens will recognize the sentiment. To one reading the accounts of social usages in early Upper Canada, Charles Dickens' characters are at once brought to mind; many seemed to have adopted all the traditional reasons for drinking.

"There are five reasons why men drink,  
Good wine, a friend, or being dry;  
Or lest you should be by and by  
Or any other reason why."

<sup>33</sup>In 1813, by the Act 53 Geo. III., C. 3 (U. C.), the legislature authorized the governor or administrator of the province to prohibit the export of grain and also distillation of spirits, strong waters and low wines from grain. The administrator, General de Rottenburg, consulting Attorney General Robinson "expressed his sentiments as to the necessity of having whiskey for the troops" and wished to license a sufficient number of distillers for that purpose. The attorney general was compelled to advise "unfortunately the legislature have put it out of his power to prohibit otherwise than generally, so that he cannot license any particular person to distill for the government, neither can he do it indirectly in any particular case by remitting the penalty, because half of it belongs to the informer." A general prohibitory proclamation was issued and "not a gallon of whiskey, or rather, spirits, can be distilled and it becomes prudent to consider whether the army have other means of supply." Letter, Robinson, to the Secretary of the Administrator, York, July, 1813, Can. Arch., Sundries, U. C., 1813. The proclamation was withdrawn with the result that the price of grain increased immensely. The attorney general, November 1, 1813, writing to de Rottenburg submits "the expediency whether the state of the army will not allow a general prohibition of the distillation of grain. The demand for whiskey enables the distillers in this part of the country (he writes from York) to offer from 12 to 15 shillings, New York currency (i. e., \$1.50 to \$1.87½) per bushel for wheat, the natural effect of which will be to raise very considerably the price of flour, an indispensable article and one of greater consumption . . . it would be well consistently with the supply of the troops a remedy could be provided by a total prohibition." Can. Arch., Sundries, U. C., 1813.

The Act of 1813 being about to expire, the legislature the following year extended it for another year (1814), 54 Geo. III, C. 8, U. C.; this expired March 14, 1815, and was not continued or revived.

Nowhere was there expressed any thought that whiskey was an evil; that is quite a recent conception and not yet universally accepted.

<sup>34</sup>I do not, in this paper, speak of these courts except incidentally. There was a Court of General or Quarter Sessions of the Peace in each District for the trial (*inter alia*) of minor offenses. Technically these courts had the power of trying all felonies and misdemeanors and during the Stewart and earlier periods thousand of thieves had been hanged at their command; but in the times now being investigated, these courts sent all capital cases to the "Criminal Assizes," the Court of Oyer and Terminer and General Gaol Delivery.

and battery were fined and imprisoned; but they were at that time liable to be whipped or set in the pillory as well.<sup>35</sup>

Rape was still a capital crime, as indeed it continued to be until the Moss Act in 1873, by which the judge was given the power of sentencing to death or to imprisonment.<sup>36</sup> An assault with intent to commit a rape upon an infant eleven years old is reported in 1814. This was in the Newcastle District (i. e., the counties of Northumberland and Durham and the territory to the rear of these counties), and a lieutenant of the navy was the offender. Mr. Justice Powell reported that to fine and imprisonment he would have added the disgraceful punishment of the pillory had not the friends of the little girl already inflicted severe chastisement upon him.<sup>37</sup>

Bestiality was still capital and so continued until 1869, 32, 33 Vic., c. 20, s. 63 (Dom.), but the extreme rigor of the proof required by the common law was relaxed by the Act of 1841, 4, 5 Vic., c. 27, s. 18 (Can.). One case of this kind is reported.<sup>38</sup>

Murder was all too common, as it had been from the first settlement of the province<sup>39</sup>; but this crime seems to have been less frequent during the war than at other times; and in the one instance

<sup>35</sup>The assault cases appear in the report of John Small, clerk of the Crown, at the Kingston Assizes, August 30, 1813, Can. Arch., Sundries, U. C., 1813. The lash disappeared from Upper Canada as a punishment in 1841, 4, 5 Vic., C. 25, U. C., and the pillory by the same act.

<sup>36</sup>The passing of this act was due to the efforts of Thomas Moss, Q. C., afterwards Chief Justice of Ontario; (1873) 36 Vic., C. 50 (Dom.).

<sup>37</sup>Can. Arch., Sundries, U. C., 1814, July-December. The trial judge says further: "For this breach of the peace they were indicted and one convicted, punished by a fine of £10 (\$40.00). I thought it necessary to suppress such proceedings and vindicate the impartial administration of justice." One may be allowed to believe that the friends took the worth of the £10 out of the miserable culprit's hide.

<sup>38</sup>Mr. Justice Powell reports, September 23, 1813, that at the Assizes for the Western District at Sandwich, "Thomas Cummins, a soldier of the Royal Artillery, was convicted and received sentence of death" for this offense. The judge adds: "I could not hold out any hope to one in his circumstances. Should, however, his officer give him otherwise a character as a useful soldier, being a young man, he might be a proper subject for executive clemency. The technical defect in the evidence, as the jury could only by inference find the act complete could be utilized as a reason." The convict was respited for three months by the judge, but it does not appear what, if anything, was finally done about a pardon.

<sup>39</sup>La Rochefoucault writing of 1795, says: "Mr. White, attorney general of the province, informed me that there is no district (there were then four districts in Upper Canada) in which one or two persons have not already been tried for murder, that they were all acquitted by the jury though the evidence was strongly against them . . . lawsuits . . . sometimes originate . . . from quarrels and assaults, drunkenness being a very common vice in this country." See my edition of La Rochefoucault's *Travels in Canada, 1795*, published by the Ontario Archives (1917) as the thirteenth report, p. 40. The accounts rendered by John White, the attorney general, bear out his statements—these accounts are to be found scattered through the Simcoe papers.



specially noted the offender was reprieved from time to time and ultimately pardoned.<sup>40</sup>

Perhaps the most startling fact disclosed by these papers is the prevalence of treason, open or concealed. Not only in the Western and London Districts, which have been considered the chief seats of disaffection, but in the middle and east of the province there was an alarming amount of sedition. We have accounts of boats built and sailing with loads of the disaffected across the lake from Whitby, Smith's Creek (now Port Hope), Jones' Creek (now Cobourg), and elsewhere; very few were retaken. Most of the traitors remained in exile—some indeed returned after the close of the war, but the number of these was almost negligible. Nearly all those who showed themselves disloyal had come from the United States<sup>40</sup> and obtained grants of free land—they proved as unreliable as some of the German immigrants to the United States have done during the war just over; these Americans were the original "hyphenates."

There were a few convictions for sedition, treasonable practices and harboring deserters; the first punishable by fine, imprisonment and pillory, the others by fine and imprisonment.<sup>42</sup>

It remains to say a word about treason. A special commission was issued containing the names of the three judges of the Court of King's Bench to try the cases of treason. The court sat at Ancaster

<sup>40</sup>Mr. Justice Campbell, at Cornwall, September 15, 1813, reports the conviction at the recent assizes there of Edward McSwiney for the murder of Andrew Fuller—he had postponed the execution "which regularly ought to have taken place the next day but one after his conviction," but could not recommend any mitigation. McSwiney was a sergeant at Johnstown in Captain Reuben Sherwood's company of riflemen. Fuller was a "mercenary," or substitute private in the same company, and they had a squabble over some blankets; both lost their temper and Fuller used very abusive language to the sergeant. They came to blows, but separated without much damage done to either. Fuller then took away the blankets, McSwiney snatched up a musket, put in a cartridge and called on Fuller to come back with the blankets. Fuller not obeying, McSwiney fired "to scare him" as he said, but killed him. Executive clemency was extended notwithstanding the view of Mr. Justice Campbell—technically murder as the act was, it was really committed in the heat of passion after a physical struggle.

<sup>41</sup>There were a few Irish "United Irishmen," and a very few native Canadians.

<sup>42</sup>Graham Clark was convicted at the Kingston Fall Assizes for sedition and sentenced to a fine of £5, imprisonment for one month, and to stand in the pillory one hour. Dan Weldon at the same assizes was found guilty of harbouring a deserter and fined £20, on default 3 months in gaol. But most of those charged with the latter offense were tried at the Quarter Sessions, e. g., Benjamin Nicholas was convicted on his own confession at the Quarter Sessions "holden at Mr. Levi Soper's at Lansdowne 6 Jan., 1814, of harbouring a deserter, a private militia man after being enlisted." The deserter was Nicholas' own son, but he was fined £5 and costs, in all £12.13.0 (say \$50). Can. Arch., Sundries, U. C., 1814.



in June, 1814, the judges presiding over the court in rotation, and of the nineteen accused fifteen were convicted, one by confession.

Two of these were American citizens and had never become naturalized; while technically they were guilty of high treason, it was not thought wise to execute them. Reasons were found for clemency to some others and in the end only eight were actually hanged.<sup>43</sup>

One matter of great interest to the lawyer-historian may be mentioned—all those who were convicted came from the Niagara and the London districts. The administrator desired that some should be hanged in the district in which the acts of treason had been committed, as the punishment would then be “of most salutary effect.” The majority of the judges of the Court of King’s Bench, however, were of opinion that the executions could not be legally ordered outside of the District of Niagara, where the convictions were had except by bringing up the convictions to the Court of King’s Bench, which had universal jurisdiction.<sup>44</sup>

<sup>43</sup>Those hanged were Aaron Stephens, Benjamin Simmonds, Noah Payne Hopkins, Dayton Lindsey, George Peacock, Jr., Isaiah Brink, Adam Crysler and John Dunham. Those whose sentence was commuted were Samuel Hartwell (not Harbitt, as Kingsford with a not unusual inaccuracy in details has the name, *Hist. Can.*, Vol. VIII, p. 471n), Stephen Hartwell—these two were brothers, young American citizens, living in the Niagara District, who had joined the traitors “through ignorance and levity” and were recommended for mercy by Chief Justice Scott. They, when being sent with six others to Kingston in charge of the deputy sheriff of the home district to be banished, effected their escape with two other prisoners, Calvin Wood and Cornelius Howey, the latter in the same condition as themselves, at Smith’s Creek (now Port Hope). All but Stephen were retaken almost at once, but he succeeded in evading the authorities, no doubt aided by some of the numerous disaffected near that place—Isaac Petit, Jacob Overholzer, “an unfortunate, but honest old man,” and apparently not too bright, Garret Neill, John Johnson, and Cornelius Howey (who had pleaded guilty).

Robert Loundsbury, Luther McNeal, Robert Troup and Jesse Holly had been acquitted at their trial. The verdicts were given from June 7 to June 21, inclusive, eleven days in all.

<sup>44</sup>Every student of the history of the English constitution will remember the attempt on the part of James II to override the law by his sovereign will and to put martial law in force against military men without parliamentary authority. He caused a motion to be made before the Court of King’s Bench for the execution at Plymouth of a soldier convicted at Reading of desertion. Chief Justice Herbert (who had been looked upon as a mere tool of the King) refused the motion “in some heat” as the prisoner was never before the court—then a habeas corpus was issued and the soldier brought before the court. But Herbert and Mr. Justice Wythens (otherwise unknown to fame) again refused the motion, saying that the prisoner being condemned in Berkshire could not be sent to another county to be executed. Three days after, a supersedeas replaced Herbert with Sir Robert Wright, “and Sir Francis Wythens had his *quietus* the night before,” and the new chief justice promptly made the order desired. That judgment established the law already spoken of, that a prisoner condemned to death brought before the Court of King’s Bench may be directed by that court to be executed anywhere within its jurisdiction, but it was a Pyrrhic victory for the king.

The story is well told by Lord Campbell, *Lives of the Lord Chief Justices*

The judges, however, suggested that the salutary effect desired might be attained and the law at the same time observed by directing the sheriff to execute some of the traitors close to the boundary line.<sup>45</sup>

At that time the sentence for high treason was in the form presented for centuries by the common law:

- (1) That you are to be drawn to the place of execution,
- (2) Where you must be hanged by the neck, but not until you are dead, for you must be cut down alive
- (3) And your bowels taken out
- (4) And burned before your face (or your being still alive),
- (5) Then your head must be severed from your body,
- (6) Which must be divided into four parts, and
- (7) Your head and quarters to be at the king's disposal.

It is probable that originally there was no interval between sentence and execution and the unhappy convict was drawn at once to the gallows; but as least as early as the sixteenth century the prisoner was ordered first to be taken to the place whence he came and thence to the place of execution.<sup>46</sup>

The punishment for high treason became simply hanging in Canada in 1868 by the Act 31 Vic., c. 69, s. 4 (Dom.), but in England

(Thompson's edition), Vol. II, pp. 93, 94 (a trifling error as to the date of the supersession of C. J. Herbert is made). See also, *Rex v. William Beal* (April, 1687), 3 Modern Reports 124.

<sup>45</sup>As I intend to make these prosecutions for treason the subject of a separate article, I do not further pursue the matter here.

<sup>46</sup>Even in quarters usually well informed there is occasionally to be found a misunderstanding of the meaning of 'drawn' in this sentence. It is supposed to be equivalent to 'eviscerated,' as a market woman 'draws' a chicken. It really means that the convict is to be dragged to the gallows. Originally he was dragged by the heels at the horse's tail over the rough and filthy ground, which sometimes killed the victim. Sometimes, as in the case of William Longbeard in 1196, rough stones were placed in the road to make the transit more painful.

But humanity was not wholly dead, and we find sometimes an ox-hide, sometimes a hurdle spread under the sufferer by friars or others. Mr. Justice Shaw in 1340 forbade this in a peculiarly atrocious case of a servant killing his former master.

The 'common ox-hide' became an institution, and it later gave way to the hurdle. From contemporary woodcuts it appears that the hurdle was of wicker, flat and oblong, about seven by four feet. The prisoner was bound in it, feet toward the horse, which was attached to the hurdle and drew it along like a stoneboat. Later the sledge came into use, although the word "hurdle" was used to denote it, and by this time every convict who was to be drawn to the gallows had a 'hurdle' to ride on.

(1) While the express words of the sentence prohibited hanging until death, it came to be the practice to allow death to intervene before cutting down. This was not always the case, as when Townley was executed on Kensington Common in July, 1716 (see *R. v. Townley*, 1746, 18 St. Tr. 829), life was found in him when he was cut down and the executioner failing to kill him by blows on the chest, immediately cut his throat.

(2) While sometimes the whole of the viscera, thoracic and abdominal,



the change was not made until 1870, 33, 34 Vic., c. 23, s. 31 (Imp.).<sup>47</sup>

Petit treason, i. e., the murder of a husband by his wife or a master by his servant had long before been put on the same footing as murder by (1841) 4, 5 Vic., c. 27 (Can.). I do not find in all our history any instance of a woman being burned for the murder of her husband, though at least one has been hanged for that offense.

were taken out, in the course of time, in most cases only a small incision was made and a small part of the viscera was burnt.

(3) A platform was placed near the gallows on which a fire was lit and the entrails burnt.

(4) 'The Head of a Traitor' was always held aloft and shown to the spectators by the executioner.

(5) While originally the body was always quartered and the parts usually sent to different parts of the kingdom, the practice grew up of simply nicking the limbs at their junction with the trunk, which was taken as a symbolic quartering.

Sometimes an additional monstrosity was added, ementulation, e. g., William Wallace the Scottish patriot suffered thus:

"Primo per plateas Londonia ad caudas equinas tractus usque ad patibulum altissimum sibi fabricatum, quo laqueo suspensus, postea semivivus dimissus, deinde abscissis genitalibus et evisceratis intestinis ac in ignem crematis, demum abscisso capite ac trunco in quatuor partes secto, caput palo super pontem Londoniae affigitur; quadrifida vero membra ad partes Scotiae sunt transmissa." ('Flores Hist.' ed. Luard. iii, 124.)

So, too, in the 'Popish Plot,' Ireland, Pickering, Grove, Langhorn and others were sentenced to suffer in this way, while Stayley, Coleman, Fitzharris and Plunket were not. Coke sentenced John Owens, alias Collins, to this in 1615; there does not seem to be any explanation of why it was ordered in some cases and not in others wholly parallel.

Those interested will find the whole subject discussed at length in Marks' 'Tyburn Tree, Its History and Annals,' London, Brown, Langham & Co., n. d. (not earlier than September, 1908) from which much of the above has been taken.

The case of *Rex v. Walcott* (1696), Shower 127; 1 Eng. Rep. 87, may be noted. Thomas Walcott had been convicted of high treason (he took part in the Rye House Plot, 1683), and was executed at Tyburn. His sentence ran: 'Quod predictus Thomas Walcott ducatur ad Gaolam dicti domini Regis de Newgate unde venit et ibidem super Bigam ponatur et abinde usque ad furcas de Tyburn trahatur et ibidem per Collum suspendatur et vivens ad terram prosternatur, et quod secreta membra ejus amputa(n)tur et interiora sua extra ventrem suum capiantur et in ignem ponantur et ibidem comburentur, et quod caput ejus amputetur, quodque corpus ejus in quatuor partes dividatur et illae ponantur ubi Dominus Rex eas assignare voluit.'

Twelve years afterwards the attainder consequent upon this judgment was reversed on writ of error by the Court of King's Bench, and in 1696 this reversal was affirmed in Dom. Proc., the sole ground being that the words 'ipso vivente' were omitted after 'comburentur' and no words used which would be tantamount, such as 'en son view.' To the argument that it would be impossible to burn a man's bowels when he was alive it was answered, 'Tradition saith that Harrison, one of the Regicides, did mount himself and give the executioner a box on the ear 'after his body was opened.' The whole report is replete with learning on this horrible subject.

See my paper "Canadian State Trials: The King v. David McLane," Trans. Roy. Soc. Can. Series III, Vol X (1916), pp. 332, 334.

<sup>47</sup>It was the conviction of Col. Lynch for high treason which drew the attention of the Parliament forcibly to the hideousness of the form of execution; his sentence was commuted and he was afterwards pardoned, he became a member of Parliament for an Irish constituency.



# Journal of

## THE AMERICAN INSTITUTE OF

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# American Institute of Criminal Law and Criminology

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## EXTRA TERRITORIAL CRIMINAL JURISDICTION IN BRITISH CANADA

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WILLIAM RENWICK RIDDELL<sup>1</sup>

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When the Treaty of Paris, 1783, the Definitive Treaty between Great Britain and the revolting American colonies, divided the territory on the continent of North America, theretofore British, between the mother country and the new republic, there was doubt as to the boundary at some points, but it was clear at others. It was perfectly clear that the parallel of 45° north latitude was the boundary from the Connecticut River west to the River St. Lawrence, and that west from that point the middle line of the Great Lakes and connecting rivers was to be taken.

Britain was in possession of territory south of the 45th parallel, where that was the boundary, and of territory to the right of the Great Lakes and connecting rivers. She had posts at Point au Fer and at Dutchman's Point on Lake Champlain and the territory between these and the 45° parallel had a population practically all of whom were Loyalists and desired to remain under the old flag. Further west, she had Oswegatchie, Oswego, Niagara (on the east of the river), Detroit, Michilimackinac, most of the inhabitants of which were also Loyalists. The United States failed to carry out certain provisions of the treaty, and Britain kept possession of the posts—which the cause and which the effect, or whether the relation of cause and effect existed at all between the two facts, is not of consequence here.

The Province of Quebec had by the Quebec Act (1774), 14 George III, c. 83, been given the territory immediately north of the 45th parallel to the St. Lawrence, thence up the eastern bank of that river to Lake Ontario, through Lake Ontario and the Niagara River, along the right bank of Lake Erie to the western boundary of Pennsylvania, south along this boundary to the Ohio, along the bank of the Ohio to the Mississippi and "northward" to the boundary of the Hudson Bay territory. Quebec, therefore, never had the territory between the 45th parallel and Point au Fer and Dutchman's Farm; nor did she ever have Oswegatchie, Oswego or Niagara; while she lost *de jure* Detroit and Michilimackinac.

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<sup>1</sup>LL. D., F. R. S., etc., Justice of the Supreme Court of Ontario.



It was not long before a question arose concerning the government of this anomalously situated territory; and it became acute when a soldier of the Twenty-ninth Regiment of Foot murdered another of the Fifty-third and a civilian was murdered by two others near Niagara.

Magistrates on the opposite side of the River Niagara, in admittedly British territory, took cognizance of these two murders, examined witnesses and sent the accused to Montreal for trial early in 1788. At that time the enormous territory, now the Provinces of Ontario and Quebec (and de facto much more), was divided into two Districts, that of Quebec coming as far west as the Rivers Godfroy and St. Maurice and that of Montreal including all the remainder (Quebec Ordinance, September 17, 1764).

When the chief justice of the Province, William Smith, found these men in the gaol at Montreal, he issued a writ of habeas corpus, and under that writ had the men brought to Quebec, the seat of government.

Lord Dorchester, the Governor, May 5, 1788, wrote an official letter to Brigadier-General Henry Hope, the Lieutenant-Governor, informing him of the facts which had been brought to his attention by the chief justice and asking for the opinion of the Council. The letter proceeds: "If they are to be tried for foreign murders under the Statute of 33 Henry VIII, ch. 23, the Commission must be preceded by the examination it directs and for that purpose I must request you will convene a competent number of the Council for the full and distinct reports which the importance of the subject and their respective cases may require. As they may be followed by a Special Commission of Oyer and Terminer, the chief justice's attendance on the preparatory examination may be dispensed with and the Committee can command the aid of Mr. Attorney and Mr. Solicitor-General on all such questions which the law and the ends of public justice may demand."

The Lieutenant-Governor called together a special Committee of the Privy Council at Quebec on Tuesday, May 20, 1788, and there attended the Lieutenant-Governor himself, two judges of the Court of Common Pleas at Quebec (Messrs. Mabane and Dunn), Postmaster-General Finlay and Messrs. Grant, Baby and De St. Ours.

The Lieutenant-Governor read Dorchester's letter and the statute referred to, and it was resolved that it should "first be considered whether the statute . . . authorizes the Committee to proceed to the examination requested" and that "it should be submitted to the attorney-general and the solicitor-general to give their opinions in writing whether the statute is in force in the province and also to call upon

them to attend the Committee on Tuesday morning at 11 o'clock to be heard with their reasons and to give such other information on the subject as the Committee may require" (Can. Arch. Q. 37, p. 224).

The attorney-general, James Monk, and the solicitor-general, Jenkin Williams, delivered their opinions in writing to Hope. They said they had considered the questions submitted to them. The opinion was:

"This question arises upon the two cases now presented to the Governor, to-wit: Alexr. Henry Thompson, a Soldier of His Majesty's 29th Regiment, for the Murder of Isaac Allen, late a Soldier of His Majesty's 53rd Regiment, at Niagara, on the South Side of the River, on Land not within the bounds described by the Quebec Act, 14 Geo. 3d, ch. 83, tho' a territory within His Majesty's Government and Protection, and James Gale for the murder of Nehemiah Street near Niagara aforesaid opinion that Stat. in force and that His Excellency the Governor Keeper of the Great Seal of the Province may legally Issue a Commission of Oyer and Terminer for the Trial of the above Felonies should His Majesty's Council upon Examination into the charges report to His Excellency that there is sufficient Ground to suspect that the said felonies have been committed.

The Crime of Murder being a Felony at Common Law the Statute has given power to try that felony out of the County or Shire where committed, and even when committed without the King's Dominions, try the same within such place as may be directed by a Commission of Oyer and Terminer to be issued for that purpose. The Quebec Act in our opinion by introducing into the Province the Criminal Laws of England and directing the same methods of Prosecution and Trial punishment and forfeitures as are used and directed by the Laws of England has made the Statute of 33d Henry the 8th, Ch. 23, "part of the laws of this Province." The Statute 33 Henry 8, c. 23 was passed in 1541—the Preamble recites inconvenience and expense arising from the practice of sending to "divers Shires and Places of the Realm and other the King's Dominions" for "Persons upon great Grounds of vehement Suspicion as well of High Treason, Petty Treason and Misprisions of Treason as of Murders" to be examined before the King's Council upon their offenses, and notwithstanding such examination, "Such Offenders . . . by the Course of the Common Law of the Realm must be indicted within the Shires or Places wherein they committed their offenses" and there tried by the Inhabitants or Freeholders. It, therefore, enacted "That if any Person or Persons being examined before the King's Council or three of them upon any manner of Trea-

sons, Misprisions of Treasons or Murder do confess such Offenses or that the said Council or three of them upon such Examination shall think any Person so examined to be vehemently suspected of any Treason, Misprisions of Treasons or Murder . . . then . . . His Majesty's Commission of Oyer and Terminer . . . shall be made . . . to such Persons and into such Shires or Places as shall be named by the King's Highness for the speedy Trial, Conviction or Delivery of such Offenders . . ." This Statute was effective over all "the King's Dominions"; and while the Statute of 1554, 1 and 2 Philip and Mary, reinstated the Common Law as to the place of trial when the offense was committed in England, it did not repeal 33 Henry 8, c. 23, where the offense was committed out of England. (See Dyer's Reports, 132, 284; 11 Coke's Reports, 63; 3 Coke's Institutes 27; 1 Anderson's Reports 104.) The Statute of 33 Henry VIII, c. 23, was in full force at the time in question (See Blackstone's Commentaries, Book IV, p. 301) and was not repealed until 1828, 9 George IV, c. 31, s. 1, as to England; 9 George IV, c. 74, s. 125 as to India.

The Colonial Crown Lawyers were of opinion that being in force in England it was also in force in Quebec.

On Tuesday, May 22, the same Members met: Hope read the opinion of the Law Officers of the Crown. Debates arose and the question was put "Is it the opinion of the Committee that they shall proceed to the Examination requested in His Excellency the Governor's letter of reference to them?"

*For the Affirmative:* Mr. Baby, Mr. Grant, Judge Mabane, Judge Dunn, Mr. Finlay (5).

*For the Negative:* Mr. De St. Ours, the Lieutenant-Governor (2).

The first paragraph of Dorchester's letter was ordered to be communicated to the Attorney-General "in order that he may take the necessary steps for bringing such Prisoners on Saturday Morning next at 10 o'clock before the Committee of Privy Council for Examination."

The next meeting was on Friday, May 23, when the same members were present. Hope read a draft by the Attorney-General of a Warrant and also a brief Statement prepared by the Attorney-General of the cases to be considered. The warrant was in the name of Henry Hope as Lieutenant-Governor. The Attorney-General was then sent for and gave verbal explanations on the mode of procedure. The draft warrant was adopted and warrants were directed to be issued for James Gale and Abraham Hammell, the Attorney-General to be notified to attend the examination on the morrow at 10 o'clock.



On Saturday, May 24, the same members were present. Monk, Attorney-General, attended and produced James Hoghtellin, who was sworn and examined. Then Abraham Hammell was brought in before the Committee and informed by the Attorney-General that he stood charged of the murder of Nehemiah Street and had been brought up under the Statute 33, Hy. 8, Ch. 23, "On certain depositions taken before the Magistrates of Niagara from whence he had been sent Prisoner under their warrant to the Gaol at Montreal and . . . removed . . . by Writ of Habeas Corpus under the order and Sign Manual of the Chief Justice . . ."

Hammell's deposition was read, also two depositions by James Hoghtellin and a brief statement of the evidence.

"The Committee then repeated distinctly to the Prisoner, Abraham Hammell, the charge on which he stood accused before them and asked the Prisoner what he has to say in answer thereto, on which he voluntarily made and subscribed the Declaration." He was then remanded to the custody of the Sheriff and a Warrant was issued for James Gale accused of the like crime. When he appeared, the same procedure was gone through with the same result.

On Monday, May 26, Mr. Finlay was employed elsewhere on "pressing and indispensable public business" and the Committee adjourned.

On Wednesday, May 28, Alexr. Henry Thompson was brought in and after the same procedure he was remanded. In his case there had been a Coroner's inquest as well as proceedings before a Magistrate at Niagara. The depositions were read as also the affidavit made by the prisoner in the Court at Montreal in September last, and two affidavits of Edward Meredith and Fras. Child taken before a Magistrate at Montreal in March last.

Instructions were given for warrants for François Nadeau and Eustache Le Comte.

François Nadeau brought in (all proceedings were interpreted to him in French).

He was charged with "Murder of John Ross at the River Arabaska in the distant Northwestern Country, which place the Attorney-General said he was doubtful of being within the ordinary Jurisdiction of the Courts of Justice of the Province and for which felony, therefore, he had brought the Prisoner before the Committee of Privy Council to be examined as a foreign murder under the Statute of 33 Henry 8, ch. 23." Examination had been taken before James McGill, J. P., of Montreal, and the prisoner had been committed to gaol at Montreal and

brought up under a Habeas Corpus issued by the Chief Justice. The same procedure was followed: Nadeau subscribed the voluntary declaration and was remanded.

Eustache Le Compte, also a Canadian, was then brought in: The same procedure and the same result followed.

Judge Mabane gave in a paper in which he said: "Mr. Mabane tho' in compliance with the Letter of His Excellency Lord Dorchester he gave his vote for proceeding to the Examination of the Prisoners and witnesses which the King's Attorney-General should bring before the Committee begs leave to be understood not to have given an opinion that the Statute of the 33d Henry 8th, ch. 23 is in force within the Province in such a manner as to authorize the Governor of it to issue a Commission of Oyer and Terminer for the trial of persons for murder committed without the limits assigned to the Province by His Commission, but only to sending them to England to be tried in such County as it shall please the King to direct."

Then the Committee proceeded to consider whether the prisoners were "vehemently suspected" of felony—all the Council except De St. Ours decided against Hammell and Gale and all but Grant against Nadeau and Le Compte—the Lieutenant-Governor giving no opinion and not voting (*Can. Arch. Q.* 36, 1, p. 280). Dorchester communicated the facts to Sydney, the Secretary of State for the Home Department, June 9; the Colonies were from 1768 till 1782 in charge of a Secretary of State for the Colonies: from the abolition of that office in 1782 by the Statute 22 George III, c. 82, till July 11, 1794, the Colonies were in charge of the Home Secretary (*Haydn's Book of Dignities*, pp. 228, 226, is in error as to Sydney's Department—see *D. N. B.* sub. voc. Townshend, Thomas, Vol. LVII, 131). In his despatch Dorchester said that he would issue a Special Commission of Oyer and Terminer to try those against whom the Council had found, without regard to the scruples of certain Members of the Council, but that in case of a conviction he would grant a reprieve till His Majesty's pleasure should be known (*Can. Arch. B.* 36, 1, 276). A Special Commission was accordingly issued. The first to be tried was Alexander Henry Thompson for the murder of Isaac Allen near the Post at Niagara. He was convicted before the Chief Justice and sentenced to death. The Chief Justice was not satisfied with the verdict on the evidence adduced and the jury interceded for a pardon, as they were informed and believed that the prisoner had been insane for several years back. Dorchester, October 14, communicated the facts to Sydney and respited the prisoner until instructions should be sent of

His Majesty's pleasure. Dorchester recommended a pardon on condition that the convict should depart from the British dominions (Can. Arch. B. 38, p. 162). October 17, the Governor reported the conviction on that day of James Gale for the murder of Nehemiah Street on September 1, 1787, near the Post at Niagara, and his sentence to death, also that he had respited the execution. He also stated that the chief witness was Abraham Hammell, an accomplice, for whom he recommended a pardon on condition of his leaving the British Dominions. The Chief Justice was firmly convinced of the guilt of Gale and the Governor made no recommendation for mercy to him (Can. Arch. Q. 38, p. 182).

Sydney submitted the matters to the Imperial Law Officers of the Crown, Sir Archibald MacDonald, Attorney-General (afterwards, 1795-1813, Chief Baron of the Exchequer) and Sir John Scott (afterwards Lord Eldon, Lord Chancellor, 1801-1806, 1807-1827). These very great lawyers gave their opinion, Lincoln's Inn, October 6, 1788, that if the offenses were in fact committed without the province, those charged could not be tried within the Province and that there was no authority in the Governor to issue such a Commission of Oyer and Terminer; that Parliament, i. e., the Imperial Parliament, must provide a remedy if one must be provided, and that it was not advisable to send such offenders to England (where the jurisdiction undoubtedly did exist) on the ground of delay, inconvenience and expense (Can. Arch. Q. 38, p. 138). Sydney sent this opinion to Dorchester, Whitehall, November 6, 1788 (Can. Arch. Q. 38, p. 137) to guide him in his future course, but said he had not yet consulted his colleagues as to those already convicted.

There was no need for Dorchester to await further instructions; and the prisoners were released.

I can find no other record of any attempt on the part of any Canadian Court to try for a criminal offense committed outside the old Province of Quebec until after the Imperial Act of 1803, 43 George III, c. 138.

But the inhabitants of the territory once undoubtedly within Quebec and while *de jure* belonging to the United States, *de facto* held by Britain had no such immunity. Detroit, Michilimackinac, &c., and their appurtenances continued under the English law and British rule. There is only one record extant of a criminal court of Canada dealing with crime in what is now Michigan, but there can be no kind of doubt of the jurisdiction being constantly exercised by the Courts of Quarter Sessions and the Courts of Oyer and Terminer for the District



of Hesse. The District of Hesse was the most Western of the four Districts into which Lord Dorchester in 1788 divided the territory afterwards Upper Canada. It stretched from the longitude of the extreme end of Long Point, Lake Erie, to the western limit of the Province. In 1792, the name was changed to the Western District.

The record mentioned will be found in the Fourteenth Report of the Bureau of Archives of Ontario (for 1917) pp. 179 sqq. The Court of Oyer and Terminer—what is generally called the “Criminal Assizes,” September 3, 1792, “His Majesty’s Court of Oyer and Terminer, and General Gaol Delivery” opened at L’Assomption (now Sandwich, Ontario) with William Dummer Powell (afterwards Chief Justice of Upper Canada) presiding. Grand Jurymen were called from both sides of the River—the Judge himself resided in Detroit—an inquisition was filed on the death at Michilimackinac of an Indian man, Wawanisse, another respecting Pierre Lalonde, killed at Sagunia (Saginaw), by Louis Roy, another of the murder at Detroit of Pierre Grocher by an Indian man called Guillet—there had been also a murder of David Lynd, alias Jacko, on the River La Tranche (the present Thames) by two Indians. True Bills were found by the Grand Jury against Louis Roy, Guillet and Josiah Cutan of Detroit (for burglary). Roy was acquitted of murder, excusable homicide by misfortune being found. He was remanded to sue out his pardon as the custom was in those days and for long after. Cutan, a colored man, was found guilty of burglary at St. Anne’s and sentenced to death. Guillet was not arrested, nor were the two Indians who slew Jacko.

A Commission, dated January 20, 1791 (still in existence—a copy in my possession; the original is in the Canadian Archives), to Powell and others to hold a Court of Oyer and Terminer and General Gaol Delivery for the District of Hesse directs them to sit in Detroit; and the seat of the Court of Quarter Sessions for the Western District (formerly the District of Hesse) was fixed at Detroit by the Upper Canadian Statute of 1793, 33 George III, c. 6: the same Statute provided for a Court of General Sessions of the Peace in the town of Michilimackinac in July of each year.

A suggestion apparently wholly unauthorized by Simcoe made to the Secretary of State that the people of Detroit should be differentiated from those of the rest of the British territory was met by the Secretary’s firm statement to Simcoe, the Lieutenant-Governor of Upper Canada, “the settlers at Detroit and the other parts are subject to the laws of the Province . . . so long as the Posts are in our possession all persons resident within the same must be considered

to all intents and purposes as British subjects." (Can. Arch. Q. 278, A. p. 24 do, do, Q. 279, 1, 251, letter dated October 2, 1793. See also Can. Arch. Q. 280, 1, p. 106.)

Until the delivery up to the United States in 1796 of these Posts, the Canadian Courts exercised jurisdiction, civil and criminal, over the occupied territory.

The prevalence of crimes of violence in the Far West and the absence of convenient means for their punishment induced the Imperial Parliament in 1804 to pass the well-known Statute 44 George II, c. 138, for the trial of offenses committed in the "Indian Territories or parts of America not within the limits of . . . Lower or Upper Canada or . . . the United States" in the Courts of Lower Canada or if the Governor should think that justice might be more conveniently administered in Upper Canada, then in the Courts of Upper Canada.

Under this legislation a number of persons were tried in the Courts of Lower and Upper Canada for offenses ranging from murder to theft, committed in the Indian Country—these trials are reported in several readily accessible publications and as none of them really bears upon extra territoriality I pass them over here.

The extra territorial power of the Dominion of Canada has been discussed in several cases.

The Criminal Code of 1892 rendered liable to conviction for bigamy any person who being married goes through a form of marriage with another person "in any part of the world," but if the form of marriage is elsewhere than in Canada the person so offending is not to be convicted of bigamy unless he, a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

The Courts divided in opinion as to the validity of Canadian legislation, making it in Canada a crime to go through a bigamous form of marriage outside of Canada; in the case of the *Queen v. Brierly* (1887) 14 Ontario Reports 525 the Chancery Divisional Court, composed of Sir John Boyd, Chancellor, Mr. Justice Ferguson and Mr. Justice Robertson held the legislation valid; but seven years later, in 1894, the Queen's Bench Divisional Court, composed of Chief Justice Armour and Mr. (afterwards Chief) Justice Falconbridge, held the contrary, in *Queen v. Plowman*, 25 Ontario Reports, 656. The matter was referred to the Supreme Court of Canada and that Court in 1897 decided in favor of the validity of the Statute. In *re Criminal Code*, Sections 275, 276, Chief Justice Sir Henry Strong dissented, but the other Judges, Gwynne, Sedgewick, King and Girouard, JJ., agreed in the

judgment, on the ground that the accused to be convicted must be found to have left Canada with intent to committ offense.

The Judicial Committee of the Privy Council, in 1891, in the case of *Macleod v. Attorney-General*, N. S. W. (1891), A. C. 455, decided that a Colony cannot convict a person of bigamy who married in another jurisdiction, e. g., the United States; so that while the question of the Lord High Stewart in *Earl Russell's Case* (1901) A. C. 446, rt. p. 448 "Has not the Imperial Legislature a right to legislate with respect to His Majesty's Subjects all over the world wherever they are?" must be answered in the alternative, the powers of a Colonial Legislature are not so extensive.



## TWO INCIDENTS OF REVOLUTIONARY TIME

WILLIAM RENWICK RIDDELL<sup>1</sup>

The life of William Dummer Powell, Fifth Chief Justice of Upper Canada, was full of stirring incidents. Born in Boston, Massachusetts, in 1755, educated at that place, in England and Holland, after spending some time in the office of Jonathan Sewell, the last Royal Attorney General of Massachusetts, he took the side of the Crown in the colonial disputes: he was one of the volunteers in the garrison during the siege of Boston by the Continental Army and sailed from Boston to England with General Gage when he gave way to Howe, October, 1775. He entered the Middle Temple as a student-at-law, and kept his twelve terms in attendance on the Courts at Westminster. Without waiting to be called to the Bar in England, he sailed for Canada in 1779. Receiving a licence to practise, he settled in Montreal, where he remained until 1789: in 1789 he was appointed First (and only) Justice of the Court of Common Pleas of the District of Hesse, then still including Detroit.<sup>2</sup> He was Judge of that Court until it was abolished in 1794, when he became a Justice of the Court of King's Bench; appointed Chief Justice of the Province of Upper Canada in 1815, he resigned 1825 and died at Toronto 1834.

His first case at the Bar, 1779, was the defence of Pierre Du Calvet, a hot-headed Huguenot, for criminal libel upon the Judges of the Court of Common Pleas at Montreal: this defence, successful as it was, brought him into disrepute with the official class. True, he had the support of the merchants, but the official class still stood aloof—the Government circles, the Military, the Judiciary—the last named had indeed been taught a bitter lesson of the estimate in which their partial conduct was held by the respectable people by the verdict of acquittal in the Du Calvet prosecution: and we hear of no further complaint of partiality in the Courts for some time. Impartiality in official position, however, is quite consistent with personal coldness or aversion—and this Powell experienced from the official class. By the end of the year had happened “an incident of a romantic cast” which

<sup>1</sup>LL. D., F. R. S. Can., etc., Justice of the Supreme Court of Ontario.

<sup>2</sup>Although by the Definitive Treaty of 1783 all the territory to the right of the Great Lakes and connecting rivers was given to the United States, Great Britain retained possession in fact of the posts at Michilinaquinac, Detroit, Niagara, Oswego, Oswegatchie, Point du Fer and Dutchman's Point until 1796, when they were given up under Jay's Treaty. See note 36, *post*.

he says "secured the good will and respect of the Military"—and this incident is now to be told.

Before Powell tells the story in his own way, some explanation should be given of the *mise en scène*.<sup>3</sup>

Even before but especially after the Declaration of Independence in 1776, many loyal citizens in Virginia and the Carolinas, some from Pennsylvania and other northern provinces, left their homes to avoid persecution by their rebel countrymen. Canada was not at first the goal of most of those

" who loved  
The cause . . . . and kept their faith  
To England's Crown" :

they for the most part went westward into the wilds of the hinterland. Kentucky—or Kentuck, as it was often called—the "dark and bloody ground," had been explored in the seventh decade of the eighteenth century by the celebrated Daniel Boone and others of the same type:<sup>4</sup> a few settlers had made their way into this wilderness before 1776. It was in Kentucky and the hinterland of North Carolina that many loyalists determined to seek a refuge and a quiet habitation<sup>5</sup>—they were not alone, for many disloyal were soon to be found scattered throughout this vast territory. This was the Indians' best hunting ground, and the settlements, however few and scattered, disturbed the game—moreover the settlers had continued the inveterate frontier custom of whites in America, and killed "every defenceless Indian they met with."<sup>6</sup> They lived up to the hideous maxim, "There is no good Indian but a dead Indian," formulated it may be in our time but felt long before.

<sup>3</sup>What follows is in great part taken from Chapter III of the Life of Chief Justice Powell now in preparation.

<sup>4</sup>John Finley, once well known but now forgotten, and a few companions from North Carolina went to Kentucky in 1767; in 1769, Finley, with Daniel Boone and others, made a further exploration. In 1770, Colonel Knox led a party from Virginia; in 1774, James Harrod built a log cabin at the present Harrodsburg and in 1775 Daniel Boone built his fort at Boonesborough; in 1776, Kentucky became a county of Virginia and in 1779 a law was passed which had the effect of enormously increasing the immigration.

<sup>5</sup>Major Arent S. De Peyster, Commandant at Detroit, writing to Lt-Colonel Mason, Detroit, May 16, 1780, says, "The prisoners daily brought in here are part of the thousand families who are flying from the oppression of Congress, in order to add to the number who are already settled in Kentucky, the finest country for the new settlers in America, but it happens unfortunately for them to be the Indians' best hunting ground, which they will never give up," Can. Arch., B. 100, p. 370.

<sup>6</sup>The language of an official letter by General Thomas Gage to Colonel Henry Bouquet from New York, Feb. 26, 1765 (Can. Arch., A 8, p. 505), when speaking of "The Disposition of the People of the Frontiers."

The Indians felt deeply the loss of their hunting grounds, upon which they depended in part for food and almost wholly for furs to barter with the Whites. Massacres took place on either side, torture and death or slavery were the lot of the unfortunate prisoner, male or female, infant or adult. The Indians were soon convinced that they could not drive out the intruder by their own efforts and they demanded help from the British posts at Detroit and Michilimackinac. Each of these places had a small garrison of the regular army and a considerable number of fur traders, fearless and adventurous. At first the Commandants or "Lieutenant-Governors" of the Forts turned a deaf ear to the suppliants<sup>7</sup>—they had no desire to take part with the Redman against their own kin, and, moreover, the posts themselves were not too secure and required for their defence all the available military force. A few volunteers joined the Indian expeditions, for such expeditions were at that time looked upon by the semi-civilized, and even by some who believed themselves to be civilized, as an interesting vacation, not unlike our own present hunting trips, and not much more dangerous. But the American became aggressive: the safety of Detroit, Michilimackinac, Niagara, became still more doubtful, the Indians began to be disaffected and threatened to take the side of the rebels; and when Henry Hamilton, Lieutenant-Governor of Detroit,<sup>8</sup> was captured by "the backwoodsman of Kentucky," Colonel George Rogers Clark, at Vincennes, early in 1779, it was obvious that something must be done to hold the Indians as well as to check the rebels.

Not much was done in that direction in 1779, but in 1780, Captain Henry Bird<sup>9</sup> of the 8th Foot, who had acted with the Indians in 1779,

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<sup>7</sup>The requests of the Indians for help to drive out the intruders are repeated time and again in the letters from the Commandants at Detroit and Michilimackinac to the Governor-General at Quebec—these are to be found in the Haldimand Papers in the Canadian Archives.

<sup>8</sup>Henry Hamilton was Lieutenant-Governor of Detroit (in 1778), he made one expedition to the South and captured Vincennes, but the following winter was himself taken with all his forces and the Post by Col. George Rogers Clark. He was treated with brutality by Jefferson, the Governor of the State, and afterwards President of the United States, but was afterwards paroled and exchanged. He then went to England in 1781, but returned to Canada in 1782 as Lieutenant Governor; he acted as Governor in the absence of Haldimand, 1784-1785; in the latter year he was cashiered, being succeeded by Henry Hope. His conduct as Lieutenant-Governor of Quebec was not wise and his recall was wholly justified.

<sup>9</sup>Henry Bird was at this time a Captain in the 8th; he took part in expeditions with the Indians in 1779 and 1780; on his return to Detroit he was, in September, 1780, appointed acting engineer at that Post, which office he filled with success. He acquired from the Indians in 1784 some land at Amherstburg, which afterwards (1796) was taken by the Government for building Fort Amherstburg to command the mouth of the River Detroit. He established his family on this land, cleared about 200 acres of it and built two or three dwelling



was placed in command of a force of about 150 White soldiers and some Indians by Major Arent S. De Peyster, who had succeeded Hamilton as (acting) Lieutenant Governor of Detroit. Bird was to gather Indians about him and with them attack the Fort at the Falls of the Ohio, i. e., Louisville, which had been built and was garrisoned by the Americans: if successful in this, he was to attack other Forts in Kentucky.

With him went "the three Girtys," Simon, George and James, of "Injun story" fame<sup>10</sup>, and at the Miami he was joined by Captain

houses, made a good garden and planted an extensive orchard at an expense of £1200—*Can. Arch.*, Q. 311, 2, p. 411; *do. do.*, Q. 311, 2, p. 398. He left Canada before 1796; he was obliged to go to England by reason of a suit in Chancery involving his whole English property and did not know of the Government expropriation till some time thereafter—he joined his regiment, the 54th, and took part in quelling the Irish Rebellion of 1798; when this rebellion was put down, he embarked for foreign service and died on the expedition of Sir Ralph Abercrombie to Egypt, 1801, having been a soldier for thirty-six years. At the time of his death he was Lieutenant-Colonel of the 54th Foot; he had previously served in the 8th and the 31st Regiments. A Petition was presented to Castle-reagh by his widow, Elizabeth Bird (*Can. Arch.*, Q. 311, pp. 408, sqq), and later in 1818 another to Bathurst by his son, Lieutenant-Colonel Henry Bird of the 87th Foot, asking for compensation from the Government. *Can. Arch.*, Q. 324, 2, pp. 271, 448, sqq. These applications were wholly unsuccessful as Haldimand's consent to the acquisition of the land was expressly conditioned on a certain defined portion being reserved for a Military Port and this reserve included Bird's lot. *Can. Arch.*, Q. 326, p. 48.

<sup>10</sup>Simon Girty is called a renegade and other hard names by most of the writers of history or tales of this western country; he had faults, but has received very hard measure—he took the losing side in the Revolutionary struggle. He was the second child, born 1741; James, the third, born 1743, and George, the fourth, born 1745, of Simon Girty, an Irishman, and his wife, Mary Newton, an English girl—they had another son, the eldest, Thomas, but he does not figure with his three brothers. The birthplace of the Girtys was near Harrisburg, Pennsylvania. The mother, after the father's death at the hands of an Indian in a drunken frolic, married John Turner, who had killed the Indian—the family moved westward and took refuge in Fort Granville. The Fort was taken by the Indians, 1756, and Turner, his wife and her children were hurried into the wilderness. Turner, being recognized, was tortured and burnt to death at the stake in the presence of his wife and her five children, the youngest being the son of Turner. She and the youngest son, John Turner, were given to the Delawares; the four Girtys for a time at least to the others. The eldest, Thomas, was recaptured within a few weeks; but Simon, James and George were taken further away and adopted by the Indians, Simon going to the Senecas, James to the Shawnees and George to the Delawares. In 1759 Mrs. Turner and her four boys were delivered up at Pittsburg. The three Girtys had thoroughly learned the Indian languages and had acquired more than a trace of Indian lore, skill and disposition. Simon at first took the side of the Colonials and was looked upon as a zealous Whig, but in 1778 he definitely chose the British cause and left Pittsburg for Detroit with Alexander McKee, Mathew Elliott and others, a party of seven in all. Thereafter until the end of his life he was an indefatigable and invaluable servant of the Crown in negotiating with, leading and taking the field with the Indians. He is said to have been the last to leave Detroit when it was given up to the Americans in 1796 under Jay's Treaty. Thereafter he lived on his farm in the Township of Gosfield in Upper Canada until his death in 1817.

He has been charged with cruelty and he was cruel as were most of the backwoodsmen of his time; but he was not wantonly cruel. Many instances are

Alexander McKee, then the Deputy Indian Agent at Detroit.<sup>11</sup> The expedition was at first successful—Fort Liberty or Ruddle's Station fell, then Martin's Fort or Martin's Station followed, and Louisville was next to be attacked. But he ran out of provisions, because of the wanton destruction of cattle by the Indians;<sup>12</sup> his prisoners were in danger of starving; the Indians were getting wholly beyond control—they had captured a few small forts or stockades of settlers and had

recorded of his saving prisoners from torture and death, more he would have saved if he could. Of his devotion to the Loyalist side I have no reason to doubt. Henry Bird, who knew him well and at whose side he had stood in times of stress and extreme danger, said of him to Lieutenant-Colonel Bolton: "Girty, I assure you, Sir, is one of the most useful, disinterested friends in his Department, Government has"—Letter from Upper Sandusky (1779). *Can. Arch.*, B. 100, p. 158.

James Girty was persuaded by Simon to espouse the cause of the Crown and he arrived at Detroit in August, 1778, about a month after his more distinguished brother. He is said to have excelled Simon in savagery, but his ferocity is much over-rated. He became a merchant at St. Marys in Ohio, married a Shawnee woman, and at length removed to Detroit and to Essex County in Upper Canada. He died in the Township of Gosfield in 1817: unlike Simon and George he was very temperate in his habits, and if he indulged in the orgies of cruelty with which he is charged, he had not the excuse of drunkenness.

George, Girty became a Senior Lieutenant in the Continental Army, but only to save himself from being sent a prisoner to the mines; he enlisted hoping to be able to make his escape to Detroit, which he effected in August, 1779; he, like his brothers, was a fearless fighter and thoroughly skilled in woodcraft. He was also employed by the Crown, but afterwards went back to the Delawares, married among them and had several children. He died at a trading post on the Maumee, about two miles below Fort Wayne, Indiana.

Those interested in the members of this extraordinary family will find an accurate and (generally speaking) impartial account in Butterfield's *History of the Girty's, Cincinnati, 1890*—the book is rare and out of print, but a copy turns up now and then in the second-hand shops.

<sup>11</sup>Alexander McKee, whose descendants are still living at Windsor and its vicinity, was one of the most useful and devoted of the officers of the King at Detroit. He, a native of Pennsylvania, had been, from 1772 on, Deputy Agent of Indian Affairs at Fort Pitt (Pittsburg) and was undoubtedly enthusiastically loyal to the Crown. He was a J. P. and carried on a large and lucrative business before the outbreak of hostilities between the Colonies and Motherland—imprisoned by General Hand in 1777, he was released on parole—being threatened with imprisonment in the following year, he made his escape to Detroit with Simon Girty and others. Thereafter he took a most active part on the loyalist side and was made a Colonel. He went into business in Detroit and was appointed Deputy-Superintendent of Indian Affairs, afterwards in 1794 Superintendent General. He was appointed in 1789 a member of the Land Board of Hesse and was granted land—he died in 1799.

We shall see that he was appointed a Judge of the Court of Common Pleas for the District of Hesse in 1788, but made way for Powell. See note 36, *post*.

<sup>12</sup>Haldimand, writing to Major Arent S. De Peyster from Quebec, August 10, 1780, after receiving Bird's report of the conduct of the Indians on this expedition, says:

"Their conduct with Captain Bird is highly reprehensible. They have incessantly reproached the Commanding officer for not sending Troops to assist them in preventing the Incursion of the Rebels and when with great Expenses and at a very inconvenient Time you fitted out one Expedition for that purpose they grew refractory and instead of complying with and supporting the measures of their conductor by which success must have been ensured, they aban-



slain at will and constantly hankered after the delights of the torture-stake—nothing was open to the perplexed Captain but to return as quickly as possible to Detroit with his prisoners and the remains of his force.

As was the case in many former raids, negro slaves were taken;<sup>13</sup> they were divided among the Indians and the whites and some were sold. Of the white prisoners taken, some were put to hard labour in

doned him, followed their wild schemes and by wantonly contrary to their engagement killing the Cattle rendered it impossible for him to prosecute the Intention of his taking the field"—Can. Arch., B. 121, p. 56.

Captain Bird's report to Major De Peyster from Ohio, opposite Licking Creek, July 1, 1780, reads:

"When they saw the Six Pounder moving across the Field, they immediately surrendered, they thought the Three Pounder a Swivel the Indians and their Department had got with them—The conditions granted That their Lives should be saved, and themselves taken to Detroit, I forewarn'd them that the Savages would adopt some of their children. The Indians gave in Council the Cattle for Food for our People & the Prisoners and were not to enter till the next day—But whilst Capt. McKee and myself were in the Fort settling these matters with the poor People, they rush'd in, tore the poor children from their mothers' Breasts, killed a wounded man and every one of the cattle, leaving the whole to stink. We had brought no Pork with us and were now reduced to great distress and the poor Prisoners in danger of being starved.

I talked hardly to them of their breach of Promise—but however we marched to the next fort, which surrendered without firing a gun. The same Promises were made & broke in the same manner, not one pound of meat and near 300 Prisoners—Indians breaking into the Forts after the Treaties were concluded. The Rebels ran from the next Fort and the Indians burn't it. They then heard the news of Col. Clark's coming against them & proposed returning—which indeed had they not proposed I must have insisted on, as I had then fasted some time & the Prisoners in danger of starving incessant rains rotted our People's feet the Indians almost all left us within a day's march of the Enemy. It was with difficulty I procured a guide thro' the woods—I marched the poor women & children 20 miles in one day over very high mountains, frightening them with frequent alarms to push them forward, in short, Sir, by water & land we came with all our cannon &c 90 miles in 4 days, one day out of which we lay by entirely, rowing 50 miles the last day—we have no meat & must subsist on Flour if there is nothing for us at Lorimiers. I am out of hope of getting any Indians to hunt, or accompany us, however George Girty I detain to assist me—I could, Sir, by all accounts have gone through the whole country without any opposition had the Indians preserved the cattle."—Can. Arch., B. 100, p. 410.

<sup>13</sup>In the reports from Detroit and Michilimackinac about this time there are many references to blacks, slaves, being brought in as prisoners. E. g., in Lieutenant-Governor Patrick Sinclair's report to Lieutenant-Colonel Bolton, Michilimackinac, June 8, 1780, he says that "the Indians & Volunteers on the attack against the Illinois . . . brought off forty-three scalps, thirty-four prisoners Black and White and killed about 70 persons. Can. Arch., B. 100, p. 430.

Lieutenant John Campbell writing to Captain Robert Matthews from Montreal August 10, 1780, enclosed a "Return of the Negroes brought in by the Indians and sold to the Inhabitants of Montreal and others" to lay before the Governor General. Can. Arch., B. 111, p. 176.

There were many negro slaves at this time throughout Canada—the Indians themselves had many—and their value as an article of trade was well known. On several occasions the Indians killed the whites whom they could not sell, but kept the blacks whom they could—it was rare although not entirely unknown that they tortured or slew a negro. In addition to negro slaves there were also Indian slaves generally known as Panis, i. e. Pawnees, from their being gen-



retaliation for the cruelty practised on Hamilton. Some, including several of those who claimed to be loyal, were sent east by way of Niagara to Montreal<sup>14</sup> and some of these to Quebec.

Now we shall allow Powell to tell his story in his own words:

#### THE TRAGEDY OF THE LA FORCE FAMILY<sup>15</sup>

"The Story so much resembles romance that if some documents did not support it there might be ridicule in the relation.

"Meeting in the Street of Montreal an armed Party escorting to the Provost Guard several female prisoners and Children, curiosity was excited and upon engaging the Non-Commissioned Officer commanding the Escort Mr. P. was informed that they were Prisoners of war, taken in the Kentucky Country and brought into Detroit by a Detachment from the Garrison and now arrived from thence. Further Enquiry, after procuring necessary relief to the first wants of the party, drew from Mrs. Agnes La Force the following Narrative:—

"That her husband was a loyal Subject in the Province of North Carolina,<sup>16</sup> having a good Plantation well stocked and a numerous family. That his political Sentiments exposed him to so much Annoy-

erally of the Pawnee tribe. See my Article on Slavery in Upper Canada read before the Royal Society of Canada, May, 1919, in the Journal of Negro History, Washington, October, 1919. There are a few instances of Indians selling whites for slaves—one of these we shall meet in the life of Powell—and very many of their enslaving white prisoners for their own service.

<sup>14</sup>Bird's return to Detroit is notified by De Peyster to Lt.-Colonel Bolton. Writing from Detroit, August 4, 1780, he says: "Captain Bird arrived here this morning with about One hundred and fifty Prisoners . . . the remainder coming in for in spite of all his endeavours to prevent it the Indians broke into their Forts and seized many—the whole will amount to about three hundred and fifty . . . the Prisoners are greatly fatigued with travelling so far, some sick and some wounded. I shall defer sending them down least it should be attended with bad consequences" . . .

Apparently the party in which Mrs. La Force was arrived at Niagara in November, as Brig.-Genl. Powell states in his letter to Haldimand, November 10, 1780, "I shall send by this opportunity fourteen Prisoners to Montreal—they are most of them women and children." Can. Arch., B. 96, 2, p. 629. And they probably arrived at Montreal, December 2, Can. Arch., B. 129, p. 190, although that is not certain; it is reasonably certain that it was late in the year. Mrs. La Force's petition reached the Governor-General, January 8, 1781, and Powell was not the man to let the grass grow under his feet in a case of this kind (see note post).

<sup>15</sup>I have copied the MSS exactly in spelling and punctuation; the use of a capital letter with nouns (still the practice in German) continued in English till well within the last century; some who had received their education in the eighteenth or the early part of the nineteenth century kept up the custom till death; it was not unusual to capitalize also the important words other than nouns—verbs were seldom so written. The universal capitalization of gentle adjectives such as French, Indian, is equally modern—hence Powell writes "british" "Mr. P" is of course Mr. Powell.

<sup>16</sup>In the Petition referred to *post*, Mrs. La Force states that her husband was "late of Virginia."

ance from the governing Party that he determined to retire into the wilderness, that he accordingly mustered his whole family, consisting of several sons and their Wives and Children, and Sons-in-law with their Wives and Children, a numerous band of select and valuable Slaves Male and female, and a large Stock of Cattle, with which they proceeded westward, intending to retire into Kentucky.

"That after they had passed the inhabited Country, they preposed to rest a few days; and having formed their camp, towards Evening a fat beeve was selected and two of his Sons undertook to kill him; one fired and the ox fell, when the other laid down his Rifle near the Tent and ran in to assist in flaying and dressing the Carcase. In the meantime the old Gentleman, fatigued with the day's march retired to his Bed in his Tent and was asleep when upon the loud report of a Gun, she found he was wounded mortally as he lay by her side. Her unhappy Son, when retiring to rest, recollected his rifle, and in feeling round in the dark among the Tent Cords, it went off and killed his father. This melancholy Event did not however arrest their Progress more than one day; but pursuing their Route to the westward, they made a Pitch in the wilderness considered to be five hundred miles from any civil Establishment. Here they surrounded a Piece of Ground with Pickets as a Defence against the Indians and built their hutts for themselves with their Slaves within it. With the strength they possessed in their own party, the wilderness soon changed its appearance, and promised amply to repay their Labours; but after a residence of three years without communication with the world, a Party of regular Troops and Indians from the british Garrison at Detroit appeared in the Plain and summoned them to surrender.<sup>17</sup> Relying upon british faith, they open'd their Gate on condition of Protection to their Persons and Property from the Indians; but they had no sooner surrendered and receive that promise than her

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<sup>17</sup>This was not one of the two large Forts which Bird took in his 1780 expedition Fort Liberty and Martin's Station, but a smaller Fortification; that there were several small forts is certain; that some of the prisoners brought to Detroit were from the small forts and that they (or some of them) were not rebels appears from the letter from De Peyster of August 4, 1780, already referred to (Can. Arch., B. 100, p. 441): "In a former letter to the Commander in Chief I observed that it would be dangerous having so many Prisoners here but I then thought those small Forts were occupied by a different set of people."

Bird in his report to De Peyster, Ohio River, June 10, 1780, speaking of the irritating conduct of the Indians says:

"I hope, Sir, my next will inform you of success in our undertakings, tho' their attack on the little Forts their number being so great is mean of them." Can. Arch., B. 100, p. 407.

Captain Alexander McKee reporting to De Peyster on the same expedition writing from Shawanese Village, July 8, 1780, tells of the capture of the two large Forts and says "the great propensity for Plunder again occasioned dis-



sons and sons-in-law had to resort to arms to resist the Insults of the Indians to their wives and Slaves.<sup>18</sup> Several lives were lost and the whole surviving Party was marched into Detroit, about six hundred Miles, where the Slaves were distributed among the Captors and the rest marched or boated eight hundred miles further to Montreal and driven into the Provot Prison as Cattle into a Pound.

"This relation will be credited with difficulty but accident some time after put into the Hands of Mr. P. a document of undeniable credit, which, however, was unnecessary; for on Mr. P.'s representation of the Case to Sir F. Haldiman the most peremptory orders to the Commandant at Detroit to find out the Slaves of Mrs. Le Force in whose ever possession they might be and transmit them to their Mistress at Montreal; but Detroit was too far distant from Headquarters and Interests prompting to disobedience of such an order too prevalent for it to produce any effect; and the Commandant acknowledged in answer to a reiterated order that the Slaves could not be produced;

content amongst them and several parties set out towards the adjacent Forts to plunder Horses." Can. Arch., B. 100, p. 413.

Haldimand writing to Sir Henry Clinton from Quebec in 1780 (Can. Arch., B. 147, p. 283) says:

"A Detachment from Detroit . . . has destroyed three Forts . . . the Fickle and Perverse conduct of the Indians prevented something great being effected"—but that the La Force fortification was not one of the three is obvious from Bird's Report (note 12 ante). Can. Arch., B. 100, p. 410.

<sup>18</sup>This conduct of the Indians was duplicated on very many occasions. The shocking massacre by Montcalm's Indian allies of the British soldiers, their women and children after the surrender of Ticonderoga in 1757 is too well known to be narrated here—Kingsford's History of Canada, Vol. IV, pp. 65-69, contains a sufficiently extended and accurate account of the horrible tragedy—a disgrace to French Arms—it may be noted that this was one of the occasions when the Indians killed negroes.

Bird has himself been disgusted with the brutality of some of his allies in the preceding year 1779—the Wyandottes were determined to torture a prisoner to death; Bird did his best, offering the savages \$400 and at length \$1,000 for him all in vain; he then advised the captive to defend himself with a gun as long as he could, but the unfortunate man was "taken away and murdered at a great rate." Captain Bird took the body and buried it, the Wyandottes dug it up and put the head on a pole; Bird buried it again and lashed out at them all "You damned rascals, if it was in my power as it is in the power of the Americans, not one of you should live. Nothing would please me more than to see such devils as you are all killed. You cowards, is that all you can do to kill a poor innocent prisoner? You dare not show your faces where an Army is: but here you are busy when you have nothing to fear. Get away from me never will I have anything to do with you." Butterfield's History of the Girty's, pp. 93, 94; 7 Pennsylvania Archives, O. S., pp. 524, 525.

Notwithstanding all that has been said and written on either side, it is plain that (speaking generally) those in authority on both sides in the Revolutionary Wars deprecated the use of Indian Allies. It is true that at all times some and in times of great stress some gave way to temptation—*necessitas non habet legem*—but all knew the danger and most avoided it as much as possible. Each side accused and continues to accuse the other, both with some justice but both with exaggeration.



although their names and those of their new masters were correctly ascertained and a list transmitted with the order, and is as follows:

"List of Slaves formerly the property of Mrs. Agnes le Force now in possession of:

Negro Scipio,	in possession of	Simon Girty
" Tim,	" "	" Mr. Le Duc <sup>19</sup>
" Ishener,	" "	" do do
" Stephen,	" "	" Capt'n. Graham <sup>20</sup>
" Joseph,	" "	" Capt. Elliot <sup>21</sup>

<sup>19</sup>Le Duc, probably Philip Le Duc, a French Canadian who cheerfully accepted British citizenship on the conquest in 1760; like most of his compatriots he preferred Royal rule to Republicanism, and he proved a useful subject. He joined Bird's party as an artificer and was well thought of by his Commander. Bird writes to De Peyster, Ohio River, June 11, 1750, "Mons. Le Duc has behaved extremely well in every respect and has been very serviceable in making shafts and repairing carriages in which matters he offered his services. You seemed, Sir, to have an inclination to serve him on our leaving Detroit; I don't doubt but you will on his return find him worthy your notice"—*Can. Arch.*, B. 100, p. 407.

He was one of the many inhabitants of Detroit who in 1769 protested against the giving of Hog Island—now Belle Isle, the beautiful Park of Detroit—to Lieutenant George McDougall of the 60th Foot; they had been accustomed to pasture their cattle upon the island as a common given to the public by de la Motte the first Commandant of the Post.

The claim of Lieutenant McDougall gave rise to the first case tried by Powell when he became Judge at Detroit in 1789. The story has been told in outline in my address before the Michigan Bar Association at Lansing, June, 1915—"The First Judge of Detroit and His Court."

<sup>20</sup>Captain Duncan Graham, an officer in the Indian Department, who was afterward stationed at Michilimackinac, *Can. Arch.*, B. 123, p. 427; do. do. C. 678, p. 160; do. do. M. G., 11, p. 525, sqq. He had taken part with Bird in his campaign with the Indians in 1779—Bird writes from St. Duski (Sandusky) to Lieutenant Lernoult, Acting Commandant at Detroit, a letter received April 17, 1779, and says: "Capt. Graham has been so anxious to return ever since the day of his arrival that it's with the utmost difficulty I have prevailed with him to remain."

<sup>21</sup>Matthew Elliott was an Irishman who emigrated to Pennsylvania before the Revolution and engaged in the Indian trade, with headquarters at Fort Pitt (Pittsburg). Trading with the Indians he was in October, 1776, captured by a party of Wyandottes and his goods taken from him. With his servant, Michael Herbert, he made his way to Detroit where in March, 1777, he was arrested as a spy by Hamilton and sent by him to Quebec. Next year he was released on parole and went back to Pittsburg via New York; in March, 1778, he escaped from Pittsburg with McKee, Simon Girty and others and with them went to Detroit. An American writer (Butterfield, *History of the Girtys*, p. 57) says, "There were not to be found . . . three persons so well fitted collectively to work upon the minds of the Western Indians for evil to the patriot cause as Simon Girty, Matthew Elliott and Alexander McKee." The subsequent efforts and success of these three fully justify this statement; they generally acted together and showed determination and consummate skill. Elliott became a Captain in the Indian service and took part in most of the campaigns carried on against the Americans. He acquired considerable property near Fort Malden where he lived for the later years of his life; his property there was laid waste by the American invader in the War of 1812. He was one of the Members of the House of Assembly of Upper Canada for Essex in the Third Parliament, 1800-1804, the Fourth, 1804-1808, and the Fifth, 1808-1812. An account of his

Negro Keggy, in possession of Capt. Elliot,<sup>21</sup>  
 " Job, " " " Mr. Baby<sup>22</sup>  
 " Hannah, " " " Mr. Fisher<sup>23</sup>  
 " Candis, " " " Capt. McKee  
 " Bess, Grace, Rachel—and Patrick—Indians

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 13

"Many years after on a Question of Property the singular Document of which follows a Copy was produced to Mr. P. and recognized as an original.

#### COPY.

Detroit, May 14, 1784.

I, Henry Bird do declare that the wench Esther became my property in Consequence of an article of Capitulation of Martin's Fort, whereby the Inhabitants and Defenders agreed to deliver up their Blacks, Moveables and Arms to the Indians as their property, on Condition that their Persons should be safely conducted to Detroit; which article was punctuly complied with and fulfilled by the Captors. The said Esther became my property by Consent and permission of the Indian Chiefs.<sup>24</sup>

(Signed)

H. BIRD,  
*Captain.*

activities would take a volume; suffice it to say, that he was one of the most active and successful of all the many active and successful servants of the Crown at Detroit.

<sup>22</sup>Probably Duperon Baby, who was of an old French-Canadian family; born in 1738, he became a prominent citizen of Detroit and a trader of great enterprise. He also was appointed a member of the Hesse Land Board and rendered valuable services in interpreting. He died at Sandwich in 1796. He was one of the three Judges of the Court of Common Pleas at Detroit who (as will be explained *post*, note 36) made way for Powell.

<sup>23</sup>Probably Frederick Fisher, an Indian Interpreter, certified by Alexander McKee as "a Man of Truth and confidence" (Can. Arch., Q. 299, p. 273) and afterwards much trusted by Colonel William Claus, Deputy Superintendent of Indian Affairs at Amherstburg, (Can. Arch., M. p. 119); he was stationed for a time at Swan Creek (Can. Arch., Q. 57, 2, p. 432) and at Chenail Ecarté (Can. Arch., C. 250, p. 296; do. do. Q. 299, p. 292). He died November 12, 1810, "owing to the effects of a violent cold"—Letter from Matthew Elliott, Superintendent Indian Affairs, to Colonel William Claus, Dept. Supt. General and Dept. Inspector General, Indian Affairs at Fort George (near Niagara on the Lake)—the letter is from Amherstburg, November 18, 1810 (Can. Arch., Q. 114, p. 74). The Indians gave "a Condolence of 111 Strings White Wampum for the death of Frederick Fisher"—Can. Arch., Q. 114, p. 77.

<sup>24</sup>It is to be noted that the slave mentionel by Captain Bird in this certificate, i. e., Esther, is not one of the slaves claimed by Mrs. La Force.

Present and Witness }  
to the Capitulation }

(Signed) A. McKee, D. A. } I do hereby make over and give my  
Indian Affairs } Right and Property in the said Wench  
and her male Child to William Lee in consideration of having cleared  
for me sixteen acres of Land.

(Signed)

H. BIRD,  
*Captain."*

The Petition of Mrs. La Force is Extant in the Haldimand Papers and is as follows:<sup>25</sup>

"To His Excellency Frederick Haldimand Esqr Captain General & Commander in Chief of His Majesty's Forces of the same, and the Frontiers thereof Vice Admiral &c.&c.&c.

"The humble Petition of Agnes La Force, Widow of René La Force, late of Virginia, now a prisoner in Montreal.

"Your Petitioner most humbly sheweth—

"That your Petitioner about three years past had the affliction of losing her said husband and was left a widow with five children: That her late husband together with his Family: and thirteen negro slaves had been obliged to remove two hundred miles into the inner uninhabited part of the country; to be out of the way of all Troubles; That her said husband always had been a very loyal subject of His Majesty, on which account he was at different times greatly distressed by heavy fines, which were Layed on him, and at last obliged him to remove from his habitation where he and his Family lived at their ease. That on the 25th of June last past your Petitioner together with her five children and said thirteen negro slaves belonging to her the Petitioner were disturbed in their (as they thought) safe retirement by a party of Soldiers and Indians of His Majesty, and were by them taken Prisoners and carried to detroit where on their arrival said negro slaves were sold & disposed of without your Petitioners consent or receiving any benefit thereby to her very great Detriment said slaves being her only resource she had and only property left in this country, and now your Petitioner and Family being in the utmost distress and considered her Farr advanced age not being able to do anything towards the support of her Fatherless children in a strange country destitute of everything she the Petitioner most humbly has resource to Your Excellency,

<sup>25</sup>The petition is dated January, 1780, but it is quite clear that the date should be 1781—this kind of error is very common in the early part of the year



and prays that your Excellency with a paternal eye will look on her very great affliction and take her case into consideration and give her said Petitioner Liberty to reclame the above mentioned her negro slaves or to order the purchasers of them to pay unto her your Petitioner whatever sum or sums of money as your Excellency will think in Justice and equity to be due to her the Petitioner as being the sole proprietor of said slaves: And your Petitioner as in Duty bound will every pray.

AGNES LAFORCE."

In the following year occurred an incident creditable to Powell's humanity; it is significant of the times and requires no explanation—this will be told in his own words:<sup>26</sup>

Montreal, 22 August,  
1782.

Sir

I should make an Apology for the Liberty I take but that I consider it a public Duty.

When you were here some time since, I am informed that mention was made to you of a young female slave bought of the Indians by a Mr. Campbell, a Publican of this Town, and that when you learned that she was the Daughter of a decent family in Pennsylvania,<sup>27</sup> captured by the Indians at 10 years of age, your Humanity opposed itself to the barbarous Claim of her Master and you Promised that she should be returned to her Parents by the first Flag with Prisoners.<sup>28</sup>

In Consequence of such a Promise the Child had been taught to expect a speedy release from her Bondage, and, finding that her Name was in the List permitted by his Excellency to cross the Lines with a flag from St. Johns, she imagined that there could be no Obstacle to her Return; but, being informed that Mr. Campbell had threatened to

<sup>26</sup>I copy from MS. of Powell's; which I have checked with photostat copies of the originals in the Canadian Archives.

<sup>27</sup>The western part of Pennsylvania is meant which was seething with conflicts on a small scale between the Loyalists and the Republicans, the Indians for the most part took the side of the former, "our savages" as Powell calls them.

<sup>28</sup>In 1780 Germain instructed Haldimand that "all prisoners from revolted Provinces are committed as guilty of high treason not as prisoners of war"—Can. Arch., B. 59, p. 54, but a change soon took place and after some intermediate stages, Shelburne, the Home Secretary, in April, 1782, instructed Haldimand that all American prisoners were to be held for exchange. Can. Arch., B. 50, p. 164. (The short lived Secretaryship for the Colonies instituted in 1768 had only four incumbents, the notorious Lord George Germain being the third—after Welbore Ellis had filled the place for a very short time it was abolished in 1782 by 22 George III, c. 82, and the Home Secretary was charged with its duties.)

give her back to the Indians, she eloped last Evening, and took refuge in my House from whence a female Prisoner, (sometime a nurse to my children) was to sett off this Morning for the Neighborhood of the Child's Parents. Upon Application from Mr. Campbell to Brigadr. Genl. De Speht<sup>29</sup>, setting forth that He had furnished her with money, an order was obtained for the delivery of the Child to her Master and there was no time for any other Accommodation<sup>30</sup> than an undertaking on my part to reimburse Mr. Campbell the Price he paid for her to the Indians. This I am to do on his producing a Certificate from some Military Gentleman, whom he says was present at the Sale.<sup>31</sup> I have no objection to an Act of Charity of this Nature, but *all Political Considerations aside* I am of opinion that the national Honor is interested, that this Redemption should not be the Act of an Individual. As Commissary of Prisoners I have stated the Case to you, Sir, that you may determine upon the propriety of reimbursing me, or not, the sum I may be obliged to pay on this occasion.

That all may be fairly stated I should observe that the Child was never returned a Prisoner, nor has drawn Provisions as such—although

<sup>29</sup>The name of Brigadier General De Speth (Spëht Powell calls him and he is sometimes even officially called "Speth" e. g. by Haldimand, Can. Arch., B. 131, p. 155) originally was Ernst Ludwig Wilhelm von Speth, but he gallicized it to De Speth (just as in the last few years the German Ochs, Gruenwald, &c, have become Oakes, Greenwood, &c). He is not to be confused with Colonel Johann Frederick Specht of Specht's Regiment, also for a time in the British service, who was a Brunswicker and died June 24, 1787, at Brunswick.

De Speth took part in the Lake Champlain operations in 1776 and 1777; he was taken prisoner in Burgoyne's disastrous Campaign, but was exchanged and afterwards stationed at Sorel and Montreal. He became a Major General and died at Wolfenbüttel, October 27, 1800.

He took command at Montreal in October, 1781, Can. Arch., B. 131, p. 128, do. do., B. 129, p. 261, and until November, 1782, he carried on an active correspondence with Haldimand in French; Can. Arch., B. 129, B. 130, B. 131; he was followed by St. Leger.

<sup>30</sup>A cartel set out August 22, 1782, with prisoners for exchange. De Speth reports to Haldimand and sends a list of prisoners on that day. Can. Arch., B. 130, pp. 33, 34.

<sup>31</sup>The purchase or other acquisition of white girls from their Indian captors was common at all times—I mention only two instances out of many appearing in the reports about that time. Owen Bowen, who had been a clerk at Niagara Falls, married a female white prisoner with three children, he complained to Haldimand from Montreal, November 20, 1783, that his two step daughters Mary and Anne West had been taken prisoners by a war party of Delaware Indians in 1779 and taken by them to Detroit, when Colonel De Peyster obtained possession of them by interceding with the Indians. The girls had lived with De Peyster for more than four years and when the stepfather wrote—as he did several times—to De Peyster to send them to Niagara the answer was returned "That the Girls could not be spared." Col. Johnson's influence had been invoked by Bowen and that of Sir John Johnson in vain. Haldimand at once ordered De Peyster to send the girls down to Montreal. (Can. Arch., B. 75, 1, pp. 239, 254.)

De Peyster writing from Detroit, May 15, 1782, to Brig. Gen. Powell tells of the Delawares delivering up five prisoners for 300 barrels of flour. (Can. Arch., B. 102, p. 43.)

there can be no doubt of her political character, having been captured by our Savages.

Richard Murray, Esquire,  
Commissary of Prisoners,  
Quebec.

Signed  
WM. DUMMER POWELL."<sup>32</sup>

The answer reads thus:—

"Sir, Quebec, 26 Augt. 1782.

I am favored with your's by Saturday's post and have since layed it before His Excellency the Commander in Chief, and I have the Pleasure to inform you that he approves much of your Conduct and feels himself obliged for your very humane Interposition to rescue the poor unfortunate Sarah Cole<sup>33</sup> from the Clutches of the miscreant Campbell; and I am further to inform you that your letter has been transmitted by his Secretary to the Judges at Montreal, not only to make Campbell forfeit the money he says he paid for the Girl, but if possible to punish and make him an example to prevent such inhuman conduct for the Future; but in any Event you shall be indemnified for the very generous Engagement you entered into.

(Signed) RICH. MURRAY."<sup>34</sup>

"Mr. Powell had redeemed his word the day it was given and paid Mr. Campbell Twelve Guineas<sup>35</sup> on production of a string of Wampum which a witness said he saw delivered by the Indians with the Girl and the Money paid by Campbell."<sup>36</sup>

<sup>32</sup>This is endorsed in Powell's well known later handwriting "To —Murray Esq., Affair of Sarah Cole, Indian Prisoner."

<sup>33</sup>Originally written "Mary Cole," but the word Mary is cancelled and the word Sarah interlined.

<sup>34</sup>This is endorsed in Powell's handwriting, "Richard Murray Esq., relating to Sarah Cole."

<sup>35</sup>By the Ordinance of March 29, 1777, 17 George 111, c. 9, the Guinea was declared equivalent to £1.3.4 Quebec Currency; this would make the price of the girl \$42.60.

It is to be presumed that Powell was repaid; he nowhere complains that he was not as he certainly would have done if he had cause.

<sup>36</sup>When in 1788 Lord Dorchester divided the territory which lay west of the present Province of Quebec into four Districts, each of the four Districts, Lunenburg, Mecklenburg, Nassau and Hesse was given a court of full civil jurisdiction, called the Court of Common Pleas; to each of these courts Dorchester appointed three laymen as judges—there were no lawyers in the land until later. To the court for the District of Hesse (all the territory west of Long Point, Lake Erie, and including Detroit and Michilimackinac) three Detroit merchants were appointed, two English speaking, Alexander McKee (see note 11) and another, and one French speaking, Duperou Baby. The inhabitants of Detroit, including the three judges themselves, petitioned for a lawyer judge, and William Dummer Powell was, 1789, appointed First (and only) Judge with all the powers of three judges.





## THE SAD TALE OF AN INDIAN WIFE

WILLIAM RENWICK RIDDELL

When in May, 1814, the Special Court of Oyer and Terminer sat in the White House or Union Hotel at Ancaster, in Upper Canada, to try those accused of High Treason against King George III by joining the American invader, about seventy Indictments for High Treason were found by the Grand Jury. Only nineteen of those charged were in custody and they were duly tried—four were acquitted, eight executed, three died in prison, one escaped and three were eventually allowed to go to the United States.

Many of those accused had gone to the United States before the Court sat, and many had otherwise eluded the Canadian soldiers and officers of the Crown, amongst them Epaphrus Lord Phelps.

Those who had gone to the United States, the country was well rid of; such of them as had no property were not thought of again, but those of them who had property were kept in mind, because by High Treason they forfeited all their property to the Crown. The forfeiture, however, took effect not on indictment, or even on conviction, but on attainder—that is, when judgment was pronounced upon the traitor.<sup>1</sup> This was the law of England, for as Blackstone somewhat sententiously says: "After conviction only . . . there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment, the indictment may be erroneous, which will render his guilt uncertain and thereupon the . . . conviction may be quashed, he may obtain a pardon, or be allowed the benefit of clergy. . . . But when judgment is once pronounced, both law and fact conspire to prove him completely guilty. . . . Upon judgment, therefore, of death, and not before, the attainder of a criminal commences, or upon such circumstances as are equivalent to judgment of death."<sup>2</sup>

Epaphrus Lord Phelps lived in the District of Niagara<sup>3</sup> and he had a lease for 999 years of one thousand acres of land on the Grand River from the well known Mohawk chief, Joseph Brant—and this valuable land was worth seizing for the Crown. But Phelps could

<sup>1</sup>This had long been established law, but a decision to that effect is reported in our courts in comparatively modern times: *Doe dem. Gillespie v. Wixon*, 1848, 5 O. S. 132.

<sup>2</sup>*Blackstone Commentaries*, Bk. IV, p. 374—of course high treason was without benefit of clergy. Blackstone is speaking of clergyable felonies, but the same rule applies in non-clergyable felonies and treason.

not be arrested to be brought to trial and formal attainder was impossible—consequently other proceedings must be taken, that the land might be seized. The criminal law of England, introduced in part of what was afterwards Upper Canada by the Royal Proclamation of 1763, confirmed in all the territory by the Quebec Act of 1774, was formally and specifically made the law of the Province by the Act of 1800.<sup>4</sup> That law provided that when an Indictment was found against any person for treason and he was not in custody, a writ of *Capias* was to be issued by a Judge directing the Sheriff of the County in which the Indictment was found to take the accused and him safely keep to answer the charge; if the Sheriff could catch him, he was (in practice) kept in gaol till the next Assizes; if not, a return was made of *non est inventus*, the Indictment was moved by *Certiorari* into the King's Bench and the accused was then "put in the *exigent* in order to his outlawry." The Court of King's Bench issued a "writ of exigent," or "*exegi facias*," to the Sheriff, commanding him to cause the accused "to be exacted from County Court to County Court until he shall be outlawed according to the law and custom of England if he shall not appear. If he shall appear, that then you take him and him safely keep that you may have his body before us at Westminster, &c., &c." Thereupon the Sheriff at five successive County Courts "exacted, proclaimed and required to surrender" the accused; if by the fifth exaction he did not surrender, on a return *quinto exactus*, the Court pronounced judgment of outlawry against him, which had the same effect as to forfeiture as attainder.<sup>5</sup>

<sup>3</sup>The District of Niagara then contained an immense territory including the present Counties of Lincoln, Welland and Wentworth.

<sup>4</sup>The Quebec Act is (1774) 14 Geo. III, c. 83 (Imp.): the Provincial Act of 1800 is 40 Geo. III, c. 1 (U. C.).

<sup>5</sup>In the case of an indictment for any petty misdemeanor or on a penal statute the first process was a writ of *venire facias* ordered by a judge directed to the sheriff to summon the accused to appear: if he did appear the object was served, if not, and the sheriff returned that he had lands in the county, then at the end of four days a *distress infinite* was issued directing the sheriff to distrain the accused by all his lands and chattels to appear; and this writ might be issued from time to time until appearance; if the return to the *venire facias* showed that he had no lands by which he might be distrained or when distrained he did not appear, a *capias* was issued as in case of treason. In treason or felony there was no process before *capias*—in treason or homicide only one *capias* was in practice allowed (except where it was supposed that the accused was in some other county, in which case a *capias* was issued to the sheriff of that county under (1429) 8 Henry VI, c. 10, and (1432), 10 Henry VI, c. 6, as in other "Felonies and Trespasses"). In felonies other than homicide, the Statute of (1350) 25 Edward III, c. 14, provided for a second *capias*, but this was found to be impracticable and "the usage is to issue only one in every felony." *Blackstone Commentaries*, Book IV, p. 314 (1st Edit. 1769).

In misdemeanors, etc., while a judge might issue a *capias* at once, to bring about outlawry the strict practice was followed. After the first *capias* was returned *non est inventus*, a second or *alias capias* was issued and then a third or



The County Court in England was a Court incident to the jurisdiction of a Sheriff and the mere fact of a person being a Sheriff gave him (or her)<sup>6</sup> the right to hold a County Court. In this Province there was no statutory provision for County Courts; the four Courts of Common Pleas instituted by Lord Dorchester in 1788 were abolished and a Court of King's Bench formed in 1794; certain District Courts were formed in the same year with inferior jurisdiction and in 1792

*pluries capias*—on non-appearance and return *non est inventus* to the *pluries*, the proceedings were removed into the King's Bench by *certiorari* and a writ of *exigent* was issued and after five exactions, outlawry followed.

The number of County Courts at which the indictée was to be exacted seems to have differed at different times. I give the practice at this time which is explained with his usual correctness and clearness by Blackstone *op. cit.* (curiously enough he does not refer to the Statutes of 1429 and 1432).

The forms of the writs may be seen in Corner's Practice of the Crown Side Q. B., London, 1844.

<sup>6</sup>The original of the office in England is hidden in the depths of antiquity. It may be said, however, that it was established and the sheriff was a well known officer, when the common law of England was in the making. The function of the sheriff in those remote days may be gathered from his title itself. The word "sheriff" came from two Saxon words, "scir," a shire, and "geréfa" (the old form is "gíróefa"); a chief magistrate, a "reeve." The exact authority of the *geréfa* is uncertain; it probably varied at various places and various times.

Before the Conquest in 1066, the "scirgeréfa" was an officer of high rank who was the representative of the King in his shire, presided at the shire-moot and was responsible for the due administration of the royal estates and for the execution of the law.

At the Conquest his wings were clipped, but he still continued to have judicial powers exercisable in certain courts (as is the case in Scotland to this day, where the sheriff depute is the judge ordinary constituted by the Crown over a particular division of the county).

As to his appointment in England it would seem that originally in some counties the office was hereditary, like an earldom. Westmoreland remained in that state till 1850 when the hereditary character of its shrievalty was abolished by Statute 13, 14 Vict., cap. 30, upon the death of the last Earl of Thanet, by which the title became extinct—the shrievalty being hereditary in this family. The result of a shrievalty being hereditary is shown by the curious incident that the celebrated Anne Clifford, Countess of Pembroke, Dorset and Montgomery, exercised the office in person, and as sheriff sat with the judges on the Bench at the Assizes of Appleby about 1650 (1 Co. Litt. 326 n.). In Scotland the hereditary nature of the sheriff's office had come to an end long before 1850, i. e. in 1747, by 20 Geo. II, cap. 43.

In many other shires, the sheriff was elected by the freeholders: there are corporations in England who elect their sheriffs to this day, e. g. London. But in most cases the sheriff is appointed by the Crown for one year only.

What is done is this: in November each year the Lord Chancellor, the Chancellor of the Exchequer, the President of the Privy Council and others of the Privy Council, and the Lord Chief Justice (or some of them) write on a slip of parchment the names of three persons, fit to serve as sheriff. His Majesty pierces the parchment with a gold bodkin at the name of one. This one is "pricked," i. e. nominated sheriff for the year.

None of these old time formalities was ever introduced into Canada—from the very beginning of British rule, the governor was given the power to appoint sheriffs, and that power exists today (R. S. O. 1914, cap. 16, section 2). See my address delivered before the Sheriffs' Association at Toronto, March 17, 1916, printed by order of the Legislative Assembly of Ontario.

still lower Courts, the Courts of Requests, were provided—all of these had civil jurisdiction and the Court of King's Bench had also criminal jurisdiction. Then each District had its Court of Quarter Sessions of the Peace.<sup>7</sup>

Nevertheless the commission of Sheriff was considered to give to the grantee the right to hold a County Court, or, as it was sometimes called, a Legal County Court, for the purpose of writs of exigent. No record of the holding of any such Court by the Sheriffs in Upper Canada is extant and it cannot be said that such Courts ever were in fact held. The fact that the Bailiwick of the Sheriff, i. e., the District,<sup>8</sup> contained in every case more than one County seems to have rendered the legality of such Courts doubtful. It being known that many traitors had escaped capture, the Legislature provided a means of procuring judgment of outlawry; the Act of 1814, 54 Geo. III, c. 13 (U. C.), "An Act to supply in certain cases the want of County Courts in this Province," became law March 14, 1814, which recited that "by law there is incident to the office of Sheriff a Court of exclusive jurisdiction in each County wherein all persons named in the legal Writ of Exigent shall be demanded, but that by reason that in the Province several Counties were contained in each of the Districts constituting the Bailiwick of the Sheriffs the Legal County Court is fallen into disuse to the great impediment of justice." The Act then constituted the several Courts of Quarter Sessions of the Peace, the Courts at which the Sheriffs should demand all persons named in any Writ of

<sup>7</sup>The Courts of Common Pleas were erected in consequence of the division of the territory afterwards Upper Canada into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, by Lord Dorchester's Proclamation of July 24, 1788. These four courts continued (the names of the Districts were changed to Eastern, Midland, Home and Western by the Act (1792) 32 Geo. III, c. 8, U. C.) until they were abolished and the Court of King's Bench erected by the Act (1794) 34 Geo. III, c. 2, U. C. The District Courts were provided by (1794) 34 Geo. III, c. 3, U. C., these became County Courts in 1849 by the Act 12 Vic., c. 78, s. 3 (Can.): the Courts of Requests were erected by (1792) 32 Geo. III, c. 6, and became Division Courts in 1841 by the Act, 4, 5, Vic. c. 3 (Can.). The Courts of Quarter Sessions were Common Law Courts instituted by the mere granting a commission for the peace in and for any district.

<sup>8</sup>The districts as they existed in 1814 were as follows:

Name	When formed	Counties contained
1. Eastern	1800	Glengary, Stormont, Dundas, Prescott and Russell.
2. Johnstown	1800	Grenville, Leeds and Carleton.
3. Midland	1800	Frontenac, Lenox and Addington, Hastings and Prince Edward.
4. Newcastle	1802	Northumberland and Durham.
5. Home	1800	York and Simcoe.
6. Niagara	1800	Lincoln and Haldimand.
7. London	1800	Norfolk, Oxford and Middlesex.
8. Western	1800	Essex and Kent.



- Exigent; and the Court of King's Bench was authorized on a return of *non est inventus* on an alias and pluries writ of *Capias* to issue a Writ of Exigent and award a Proclamation requiring the Sheriffs to demand the Party named three several times at three successive Courts of Quarter Sessions and to affix the Proclamation at the door of the Court House each time, and upon the third demand, the party not appearing, Judgment of Outlawry was to be pronounced by the Coroner and returned by the Sheriff with Writ and Proclamation, and the judgment of outlawry was thereupon effective.

This Act was apparently drawn under a misapprehension of the Law of England and under the supposition that in all cases an *alias* and a *pluries* writ of *Capias* was necessary before *exigent*. That, we have seen, is a mistake (see note 5). In the following year the error was rectified: the Act (1815), 55 Geo. III, c. 2 (U. C.), provided that the *alias* and the *pluries capias* should not be necessary except where required in similar cases by the Law of England. The Courts of Quarter Sessions of the Peace were declared to be "in the place of the Sheriff's County Courts in England as far as respects any purpose of outlawry or any proceedings therein." Then the Act provided fully for the practice. *Capias*, return *non est inventus*, *alias capias*, return *non est inventus*, *exigent* returnable the first day of the fifth term from that in which it was awarded (the Court has four terms every year). proclamation and demand at three successive Quarter Sessions, return and judgment of outlawry by the Court. This Act was to be in existence till the end of any session of Parliament sitting March 14, 1817; and the Act of 1814 was repealed.

On a day in Michaelmas Term, 55 Geo. III, Saturday, November 19, 1814, the Acting Attorney General, John Beverley Robinson, moved the Court of King's Bench (Scott, C. J., Powell and Campbell, JJ.) and obtained an order for a writ of *certiorari* to the Commissioners who presided over the Special Court of Oyer and Terminer<sup>9</sup> to return the Indictments against "Epaphrus Lord Phelps, late of the County of Haldimand in the District of Niagara, Schoolmaster."<sup>10</sup> The Attorney General also obtained a Writ of *Certiorari* addressed to the Justices of

<sup>9</sup>Themselves and their "associates"—the associates were mere "dummies" and the justices did all the work, sitting alternately. See my article, "The Ancaster Bloody Assize," 1814.

<sup>10</sup>See King's Bench Term Book No. 6 now in the Ontario Archives.

<sup>11</sup>Writ of *Certiorari* to the Special Commission and to the Ordinary Assize Judges were also obtained in the cases of 1. Daniel Phillips, 2. Abraham Harding, 3. Ebenezer Kelly, 4. Asa Bacon (or Baton), 5. Barnabas Gibbs, 6. Simon Maybe, 7. George Peacocke, Senior, 8. John Gibbs, 9. John Dixon, 10. Elisha Green, 11. John Bacon, 12. Henry Dockstader, 13. Jonas Olmstead, 14. Seth Smith, 15. William Sutherland, 16. Martin Feit, 17. Henry Ouston, 18. Frederick Ouston, 19. William Stewart, 20. Samuel Green, 21. John Harvey, 22. Elias Long.



Oyer and Terminer and General Gaol Delivery for the District of Niagara to return the writs of Capias against Phelps returned before them at their Court—this was the regular Assizes held at Niagara after the Special Court at Ancaster had risen.

The Indictment and proceedings being returned to the Court of King's Bench, a writ of *exigent* and Proclamation was obtained by D'Arcy Boulton,<sup>12</sup> the Attorney General, against Phelps on Saturday, January 14, 1815, the first day of Hilary Term, 55 George III.<sup>13</sup>

He was duly exacted for three successive Courts of Quarter Sessions, and on the First Day of Easter Term, 1816, the Sheriff made

23. Guy Richards, 24. John Shoefeldt, 25. William Merritt, 26. William Wallace, 27. Ira Bentley, 28. Joseph Lovitt, 29. Gideon Frisbee, 30. George Cain, 31. Phineas Howell, 32. Abraham Markle, 33. William James, 34. Eleazer Daggett, 35. Oliver Grace, 36. William Biggars, 37. Andrew Westbrook, 38. Samuel Jackson, 39. David Hill, 40. Benejah Mallory, 40. Silas Deane, 42. Josiah Deane, 43. Joseph Willcocks, 44. William Markle, 45. Eliakim Crosby.

George Peacocks, Jr., has been executed July 20, 1814, Nos. 32 and 43 were members of the House of Assembly and were expelled therefrom—the latter was found killed at Fort Erie in the uniform of an American colonel.

<sup>12</sup>D'Arcy Boulton, the Solicitor General, had been taken prisoner by a French privateer and was prisoner in France when John Macdonell, the attorney-general, was killed at the Battle of Queenston Heights, October, 1812. John Beverley Robinson, a law student not yet called to the bar, was made acting attorney-general; when Boulton returned to Canada during the short peace of 1814, he became attorney-general: Robinson went to England, but was soon made Solicitor General.

<sup>13</sup>The same order was obtained against all in list in note 11 except Nos. 35 and 36, on the first day of Trinity Term, 55 Geo. III, July 3, 1815, and *Exigent* and *Proclamation* issued "on return of alias capias non est inventus": on the same day, also against Nos. 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, the reason of this duplication of process does not appear.

On Saturday, April 13, 1816, Easter Term, 56 Geo. III (Scott, C. J., Powell and Campbell, JJ.), D'Arcy Boulton, Attorney General, obtained "Duplicate Writs of Exigent against the undermentioned persons (on Mr. Sheriff's affidavit of the loss of the original writs):

- |                         |                     |
|-------------------------|---------------------|
| 1. Danl Phillips        | 9. Abram Markle     |
| 2. Wm. James            | 10. William Merritt |
| 3. Ira Bentley          | 11. Abram Harding   |
| 4. Asa Bacon            | 12. George Cain     |
| 5. Epaphrus Lord Phelps | 13. Gideon Frisbee  |
| 6. Joseph Lovett        | 14. William Wallace |
| 7. Ebenezer Kelly       | 15. William Markle  |
| 8. Phineas Howell       |                     |

These Writs all issued 26th April, 1816."

Another prosecution appears from the following entry in Term Book No. 6:

"In Hilary Term, 57 Geo. III, Friday, January 10, 1817, before Scott, C. J., and Campbell, J.

The King

vs.

Saml. Thompson

High Treason

Motion for Writ of Exigent in the above cause tested of the first day of Hilary Term instant.

Motion of D'Arcy Boulton,  
Attorney General."

Issued 20 Jan'y '17.

his return, whereupon by virtue of section 9 of the Act of 1815, 55 Geo. III, c. 2 (U. C.), Phelps incurred the same forfeiture and disabilities as in cases of outlawry by the criminal law of England.<sup>14</sup>

This case was not, however, the only ground upon which the Crown could claim that the land of Phelps was forfeited. The Legislature in 1814 passed an Act<sup>15</sup> reciting that many persons inhabitants of the United States had claimed to be British subjects and had obtained lands in the Province, but had since the declaration of war withdrawn from their allegiance into the United States; and the Act declared that they should be taken and considered as aliens born and incapable of holding lands in the Province. The Act further provided for an Inquisition by a Commissioner "by the oaths of twelve good and lawful men" as to the persons so offending and their lands as of July 1, 1812. All persons interested were to have a year after the finding of the Inquisition or one year after the conclusion of Peace to traverse the Inquisition. Peace was declared after the Treaty of Ghent, December, 1814; but the Commissioner to inquire concerning the lands of Phelps and others did not sit until January 28, 1818. The Commissioner presiding was Abraham Nelles; he called a jury of twelve men, whose Foreman was William Nelles, and they found that Phelps was seized of the unexpired portion of the lease of 999 years from Captain Brant. No claim was made at the time against the right of the Crown; nor was any made under the Act of November 27, 1818,<sup>16</sup> vesting the estate of such "aliens" in Commissioners and giving all interested the right to claim within a limited time before the Commissioners with an appeal to the Court of King's Bench.

But when the Commissioners began to take possession of the land, there was trouble at once. The land had been leased by Brant, May 1, 1804, to Phelps for 999 years for providing for his wife, Esther, a Mohawk woman and three children born to them. The wife and children were likely to lose their support; Brant indeed was dead, but the Chiefs of the Six Nation Indians were alive to the importance of the matter. An Act was procured from the Legislature, April 14, 1821, giving Esther six months to traverse the Inquisition.<sup>17</sup>

Dr. William Warren Baldwin was retained by the Indians; he was Treasurer of the Law Society and had been in this high position five separate years and was to be such again. Baldwin filed a traverse

<sup>14</sup>See the return made by Attorney-General Boulton, May 27, 1817. Canadian Archives, Sundries U. C., 1817.

<sup>15</sup>(1814) 54 Geo. III, c. 9 (U. C.) passed March 14, 1814.

<sup>16</sup>(1818) 59 Geo. III, c. 12 (U. C.) November 27, 1818.

<sup>17</sup>(1821) 2 Geo. IV, c. 31 (U. C.) April 14, 1821.

claiming that the Six Nations were allies and not subjects of King George III, a distinct though feudatory people; that the land given them by Sir Frederick Haldimand, October 25, 1784,<sup>18</sup> was theirs to dispose of as they would; that the lease was in accordance with Mohawk custom; that Phelps had such an estate as he could not forfeit, a trust limited to him providing for Esther Phelps and her children.

The case was argued before the two puisne Justices, Boulton and Campbell, JJ. (the Chief Justice, Powell, being absent), by Baldwin for the Traverser and Henry John Boulton, Solicitor General for the Crown in Michaelmas Term, 4 Geo. IV, 1823. The report<sup>19</sup> shows that it was well argued on both sides. The Solicitor General took the position that the "supposition that the Indians are not subject to the laws of the country is absurd; they are as much so as the French Loyalists who settled here after the French Revolution" (the De Puisaye settlers). The Court held for the Crown and the Indian wife was left to the care of her tribe.

<sup>18</sup>A so-called treaty—see *Morris' Indian Treaties*—whereby October 25, 1784, Haldimand, then Governor General of Canada, at the direction of the Home Government did "authorize and permit the Mohawk Nation and such others of the Six Nation Indians as may wish to settle in that quarter, to take possession of and settle upon the banks of the river commonly known as the Ouse or Grand River running into Lake Erie, allotting to them for that purpose six miles deep from each side of the river . . . which they and their posterity are to enjoy forever."

<sup>19</sup>*Taylor's Reports, Court of King's Bench of Upper Canada*, p. 47.



WISCONSIN BRANCH

American Institute of Criminal Law  
and Criminology

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PROCEEDINGS

OF THE

FIFTH ANNUAL MEETING

HELD AT

GREEN BAY, JUNE 23-24, 1914

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OFFICE OF THE SECRETARY  
1204 Rutledge Street  
Madison, Wisconsin



## ADDRESS ON CRIMINAL LAW AND PRACTICE

BY THE HONORABLE WILLIAM RENWICK RIDDELL, LL. D—  
F. R. HIST. SOC., ETC., JUSTICE OF THE SUPREME  
COURT OF ONTARIO.

DELIVERED AT THE JOINT MEETING OF THE WISCONSIN  
BRANCH, AMERICAN INSTITUTE OF CRIMINAL LAW  
AND CRIMINOLOGY, AND THE WISCONSIN  
STATE BAR ASSOCIATION,  
JUNE 24, 1914.

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Anatomists tell us that in our bodies are many remains of organs which were beneficial in the earlier stages through which our race has come, but are now not only useless but actually harmful or dangerous. If it were Nature's way to create a species *unoflatu*, and if she were to plan mankind anew, there are many things which she would omit, many improvements she would make; appendicitis would be unknown, and the supra-renal capsules would do their work better.

But that is not the method of Nature (perhaps you will prefer to say, of God); everywhere in plant and animal life we find survivals, relics, remains; and it is well if these are only interesting but harmless, and not full of peril to the organism as well.

So, too, in the institutions of civilized nations there are everywhere survivals from an earlier stage—the noble families of Europe, who have a different kind of blood from ordinary humanity—and boast of *der Geburtsadel*, which no one can acquire, however able, brave and successful in life—the created nobility of Britain, consisting largely of successful lawyers and brewers—the orders of Knighthood and Companionship which find their way even beyond the seven seas. If the United States escapes these distinctions, its people more than make up for it in dubbing aldermen and their



like "Honorable," in the never failing crop of Colonels and in the gorgeous array of dignitaries of the secret societies, from the Supreme Potentate of the Nobles of the Mystic Shrine to the Tyler of the Subordinate Lodge of the Royal and Select Sons of Ham.

It was once necessary that a strong and wise man should lead the army and direct the policy of the clan; it was to be expected that the children of such a man would be more competent than those of less illustrious birth; and so noble families were of use. But no one would now, however high a Tory he might be, say that "the son of his father" is by birth a legislator to be desired; and the House of Lords has lasted thus long only from being constantly recruited from the other classes by the inclusion of able and successful commoners.

Because peculiar circumstances—perhaps the small size of the Chapter House at Westminster—brought about two Houses of Parliament in England, the United States, the Dominion of Canada, all the States of the Union, and two of the nine provinces of the Dominion have two Houses in their Legislature; and it is hard to convince some Americans and a few Canadians that this is not the ideal state of things. We in Ontario have got along for nearly fifty years without feeling the need of an Upper House; but then, of course, we are Radicals. Whether if any one were set to it to frame a constitution for a people who never have had one, he would erect two houses of legislation to correct each other's errors, each one must decide for himself; we in Ontario want none of it.

Law, which is the direction laid down by the community for its own governance, and which expresses the very genius of the people, could not be exempt from the rule; whether substantive or adjective, it must *ex necessitate* smell of the past. Not a few of these defects in the law which are most persistently and vehemently complained of, are due to the very nature of the law itself, and are the remains of organs formerly of value but now almost if not quite useless and, it may be, harmful; these the people in their corporate capacity have not seen fit to remove, or the courts, through their instinctive conservatism, have not yet seen fit to abolish by the exercise of inherent or donative power.

Not only are the courts conservative, but the common people have in all matters connected with the courts the same tendency—what they have been accustomed to is *prima facie* right, and innovation must prove and justify itself.

The legislator must always bear in mind the inertia of the mass of the community; the laissez faire method, the “Can-not it be let alone?” of Lord Melbourne, is the easiest and most likely to cause public discontent. *Quieta non movera* is a maxim dear to cautious minds; and unless there is a real popular demand or urgent persistence of ardent reformers it is apt to be the governing principle of those in authority.

It must never be forgotten that in our system of government, legislation is not only by the people, but for the people, and no government can go far in advance of public sentiment. In the administration of law, it is a favorite saying of mine that it is almost as valuable that the litigants and the public generally believe that fair play has been given and justice has been done as that the decisions are sound in law. And I am the more and more convinced that the true function of a court is not performed when the decisions are absolutely right according to law unless at the same time the public at large believes in the righteousness of the decisions.

It nevertheless may not be without value to consider what criminal law and procedure would be if one were at liberty to disregard established usages and reverence for the past. If I do that mainly by considering the law and practice with which I am most familiar, it will be but natural and no harm will be done.

Most crimes have two distinct elements, a wrong to an individual and a wrong to the state but this view is not antique but comparatively late. In primeval times the trespasser wronged some individual—for the idea of the state had not been developed, though we can see it ever and anon peeping through the adumbration. The wronged must vindicate his wrong by his own hand, and if he was the weaker he was helpless. When the court was instituted to decide rights the person injured must come into court and complain, and even then in many cases he must be prepared to rely upon himself, for the wrongdoer might insist upon the right to justify his conduct by sword or club. When trial by battle became obsolete, the necessity did not cease for the injured himself to take all the labor and risk of a lawsuit to



obtain his rights. And no English speaking people has ever yet devised any method of giving every man his due, *suum cuique tribuere*, without forcing him to be himself a litigant. Some day, some one may destroy that appendix vermiformis.

It would answer no good purpose to trace the steps whereby the King's Court took cognizance of crime; but it is not unworthy of notice that except in offenses against the state, criminal prosecutions were long left entirely in the hands of private prosecutors. Saying nothing of the present practice in England, crown prosecutions, i. e., prosecutions for crimes, are on this continent (speaking generally) in the hands of public officers appointed for that purpose, and at least theoretically, the person who may have been injured by a trespass which is also a crime has no say in the criminal proceeding. This is as it should be. A crime is an offense against the people at large, and the people at large, the state, the crown, should conduct all prosecutions for such offenses.

In Ontario there are two kinds of crime which the injured person must himself prosecute (viz., criminal libel and nuisance), although he is allowed to use the name of the crown in such prosecution. This is an anomaly and should be changed. There is no more reason why a person should be forced to prosecute one who has stolen his character than one who has stolen his cow. Some public spirited attorney general will one day use the knife here.

While it was admitted that a crime might be a civil trespass, it was for some time considered—indefinitely indeed and without express decision—that the trespass was merged in the crime and gave no cause of action. This has long ceased to be law, if it ever was law.

But another legal proposition was advanced which has a little vitality still in some jurisdictions. Under the English system of private prosecution it is obvious that there were many temptations to omit to prosecute where no benefit except that afforded by revenge for injury would accrue to the injured. It was upon this consideration that the theory was based that no action would lie until the injured had prosecuted the wrongdoer criminally. It is more than likely that the King's Courts desired prosecutions for more mercenary and less laudable reasons than public justice; but the theory just spoken of answered well enough.



Such considerations never should have any part in countries in which criminal law is administered by a public officer; and in any case it is gross hardship on the individual to deprive him of redress until he had given time and money to do for the state what the state should do for itself.

In at least one state in the Union the common law rule still subsists, contrary, as I venture to think, to the true principles of democracy.

For reasons more or less cogent, more or less satisfactory, no civilized state attempts to punish every instance of wrongdoing. Some classes are left *in foro conscientiae*, the liar can lie with impunity so long as his lie is a lie *simpliciter*, and does not come within the class of forbidden lie. Thraso's tribe is not yet extinct, but continues spreading itself like a green bay tree, and Barnum's mermaid and Joyce Heth have numerous successors.

So long as the state contents itself with punishing certain classes of wrongdoing only, the people are entitled to know exactly what is forbidden. If there were no direction in the law other than the famous *Honeste vivere, alienum non laedere, suum cuique tribuere*, there would be no need of anything but an enlightened conscience to enable every one to know when an act was unlawful. But that rule never was law in the true sense or anything else than a glittering generality.

For long the judges in fact made while pretending to declare the law: "*est judicis non dare sed dicere legem*" was not even approximately true till comparatively late in our jurisprudence. The English judges declaring the common law to be the perfection of human reason, proceeded to apply their reason to the case before them, and what they found in their reason they declared to be law. The result was as was to be expected; the rulings as to crime at the common law were anomalous and in many cases absurd: a thief of twenty shillings might be hanged, a swindler of twenty pounds go scot free. The horrors of the state trials are in no small measure due to common law notions of crime. Legislation was necessary, and it must be said it was unsparingly resorted to; scores of acts were passed, and offenses manufactured almost without limit. The curious antipathy of English legislators and lawyers to codification was manifest in this field as elsewhere; and it was but the other day that even partial codification was resorted to.

In Canada before 1759-1760, the French law was in force, criminal as well as civil. At the conquest, the British governors introduced the English criminal law as well as they could; and this was confirmed by the Royal Proclamation of 1763, when Canada was ceded to Britain. The English criminal law was brutal and bloody enough in all conscience, but the French was worse, having such choice proceedings as *lettres de cachet*, the rack, breaking at the wheel and the like. The French-Canadians made no complaint against the English criminal law, although they decidedly objected to the English civil law; this dislocated their old customs, and they were never tired of expressing their wonder that intelligent people like the English should think their property safer in the determination of tailors and shoemakers than in that of their judges; a wonder which is still very widespread among civilized nations.

When the complaints of the French Canadians were hearkened to by the home authorities, and legislation passed to change the law to suit them, the Quebec Act of 1774 re-introduced the old civil law but retained the English criminal law.

At that time there were very few settlers or inhabitants in what afterwards became Upper Canada; but after the peace of 1783, when the independence of the United States was acknowledged, many loyal subjects of the British Crown gave up home and country that they might keep their faith, the oath of allegiance which they had taken and the flag which had covered them at birth and through life. These cavaliers of the new Revolution made their way in great numbers to the north, crossed the international rivers Detroit, Niagara, St. Lawrence, and peopled the wilderness, "but then 'twas British wilderness." They were English-speaking, born under the common law, and were intolerant of any other; *noluerunt Angliæ leges mutare* as were the barons centuries before. Many representations were made to the advisers of the King; the French Canadians would have none of the common law, the English Canadian none but the common law.

The gordian knot was cut by forming two provinces and allowing a legislature in each to make such laws as were thought suitable to its own province. The Constitutional act of 1791, 31 Geo. III, c. 31, made two provinces, Upper and Lower Canada, which lasted for fifty years.



No immediate change was made by either province in the criminal law, but Upper Canada by the very first act of its first parliament introduced the common law of England in civil matters. From that time until the Union in 1841, the two provinces from time to time amended the criminal law. Speaking generally, these amendments followed *pari passu* the amendments of the criminal law in England. The two provinces were again made one in 1841 by the Union Act of July 23, 1840, 3 and 4 Vict. c. 35; and thereafter the amendments to the criminal law were applicable to both.

The Provinces of Nova Scotia and New Brunswick had also their own criminal law much the same as that of England, so that when in 1867 these provinces were combined with Canada to form the new Dominion of Canada, the whole dominion had practically the same criminal law. The British North America Act gave the subject of criminal law and procedure to the dominion, while the constitution of the courts was allotted to the separate provinces. Prince Edward Island and British Columbia afterwards joined the Dominion, bringing in their own criminal law nearly identical with the law of the original provinces. Manitoba, Saskatchewan and Alberta are new provinces, created by the Dominion, and the Yukon Territory has also been organized—these nine provinces and the Territory comprising all the fully organized portions of the Dominion.

After confederation there were partial codifications from time to time following rather closely the like legislation in the Mother Country; but there continued to be many references to and much consideration of the common law. At length, in 1892, a complete codification was made of criminal law and practice; members on both sides of the House united in a careful examination of precedents, and in consideration of judicial opinions and of the needs of the country; and their joint efforts resulted in the criminal code of 1892, 55-56 Vict. c. 29, which came into force July 1, 1893, and made the criminal law substantially the same throughout the Dominion. Sir John S. D. Thompson, Minister of Justice and shortly after Prime Minister of the Dominion, deserves most of the credit of this legislation; he had been a justice of the supreme court of Nova Scotia and understood the value as well as the practical necessity of such an act.



The code, which is substantially unaltered, although it has been amended from time to time, defines in simple language each of the crimes known to the law. When technical terms are used, they are defined; the elements of each offense are set out so that "he who runs may read," and no one can have the excuse that he could not understand the meaning of parliament. All technical distinctions are wiped out, there are no felonies and misdemeanors, but only offenses; justifiable and excusable homicide are the same; every kind of stealing is theft, whether it would be larceny at the common law or not, etc., etc.

All this grieved the heart of the criminal lawyer; his mystery was not only in danger, it was revealed to the uninitiated; but judges are grateful and the administration of justice is quickened and cheapened and the change has proved wholly satisfactory. Of course, as was to be expected, there is already a body of decision and there must be still more. In our highly metaphorical language it is impossible to make any statement (except of the simplest kind) which is unambiguous, into which ingenuity cannot read two meanings—it is even said that two and two do not always make four but sometimes twenty-two. So, too, imperfections have been found and more will be found which must be corrected by legislation. Nothing is perfect, *humanum est errare*.

I shall not extract the definition of the several crimes: they are much as those given in Bishop or Russell.

What will perhaps be of most interest to an American lawyer is the method of prosecution. All offenses are divided into indictable offenses and those non-indictable. Non-indictable offenses are prosecuted before one or more justices of the peace, the code prescribing with care the number.

Personally, I have always thought that the practice of trying before justices of the peace is a blot on our system; it is of course historical. Whatever may have been the conservators of the peace at the common law, our system of justices of the peace derives from the statute of 1 Edw. III, from and after which all justices of the peace received their commission from the King. They constituted the Court of Quarter Sessions and were given certain powers out of sessions. The office was introduced into Canada with the English criminal law, and justices of the peace have been known in Upper Canada before it became Upper Canada, and still

continue. Not being judges, they are appointed by the provincial government; they have no civil jurisdiction and their criminal jurisdiction is strictly limited by statute. They are almost always laymen, but are saved from very gross error by their right of consulting the county crown attorney, a provincial officer appointed for each county to direct the administration of criminal justice.

There are in many counties, and in all cities and in towns of over 5,000 inhabitants, police magistrates, generally salaried officers, appointed by the province. These are almost always barristers and, having the powers of two justices of the peace, they do most of the inferior judicial work.

It may seem anomalous that while a civil action however small must be tried by a judge who has been appointed by the Dominion and who must when appointed have been a barrister of at least seven years' standing, very grave criminal charges involving heavy fines and terms of imprisonment may be tried by a layman who perhaps has had no training in law. But we Canadians are a practical people, we care not a straw for consistency, and if an institution works well we are apt to retain it, whatever strict logic would say.

To speak now of the practice. One is accused of a crime: an information is laid against him before a justice of the peace, a summons (or if necessary a warrant) is issued, and he is brought before the justice. It may be an offense which one justice may try; if so, he tries it forthwith or on some day arranged; or it may be an offense which requires two justices; if so, he sends for another magistrate unless he has himself the power of two justices of the peace; it may be an indictable offense; the justice proceeds to hear all the evidence against and for the accused, and if *prima facie* case is made out, he commits for trial.

The two jury courts with criminal jurisdiction are the Supreme Court of Ontario and the Court of General Sessions of the Peace, successors respectively of the Court of King's Bench and the Court of Quarter Sessions. There are a few kinds of crime which are cognizable only in the Supreme Court, such as murder, treason, sedition, piracy, judicial corruption, etc., etc., but all others may be tried at either the Sessions or the Assizes (as the sittings of the Supreme Court is generally called), and it is the tendency to try all in the Sessions which can be tried there.



There are not a few cases in which an accused, if he is brought before a police magistrate, can elect to be tried by the police magistrate at once. Some can be so tried without his consent. If a person is brought before a police magistrate charged with an offense for which he might be tried at the Sessions, the offense not being one for which he may be tried without his consent, the magistrate states to him the substance of the charge and asks if he consents to be tried by the magistrate or desires that the case be sent for trial by a jury—mentioning the date at which probably the case would come up. If the accused consents to trial by the magistrate, he is tried accordingly without delay. A great majority of the cases are tried by the police magistrate in this way, and not trivial offenses, either—some are crimes calling for seven years, fourteen years, or even a maximum of life imprisonment.

If the accused prefer a jury, the case is investigated before the police magistrate, and if a *prima facie* case is made out, he is committed for trial. Bail may be allowed or refused.

Within twenty-four hours of the arrival of a person in a gaol, committed for trial for an offense within the jurisdiction of the Sessions, the sheriff of the county must notify the judge of the county court (who acts as chairman of the general sessions of the peace) of the name and charge, whereupon the judge must, with as little delay as possible, have the prisoner brought before him. The judge then states to the prisoner the substance of the charge and that he has the option of being tried forthwith before the judge without a jury or to be tried in the usual way by a jury. If the prisoner elects trial by the judge, an early day is fixed for the trial, a simple form of charge is drawn up (the statute gives a form), and the trial is proceeded with. I have already said that in every county there is a county crown attorney; he is appointed for life. It is his duty to investigate all charges of crime and to prosecute them before magistrates and judges of all courts except the supreme court, and he must draw up the charge and prosecute it before the county court judge.

The county court is a court of inferior civil jurisdiction in each county; it is presided over by a judge appointed for life by the Dominion government; the judge must have been a barrister of seven years' standing. In many counties there



are more than one judge in the county court, with the same jurisdiction; and they divide the work amongst them. One will take jury, another non-jury cases, or one will take all the county court work and another the division court cases, etc., etc. One (not always the same) acts as chairman of the sessions, and holds the county judge's criminal court which is now being spoken of.

The county judge, in his criminal court, has all the powers of the sessions, and in practice weeds out most of the sessions cases, including not a few of those in which the prisoner has declined to be tried by the police magistrate. Even after electing a jury trial, when before the county judge, the prisoner may change his mind, and unless the judge or prosecuting officer thinks it not in the interests of justice, he may be allowed to change his election and be tried by the judge, while if only one of two or more charged with the same offense demands a jury, the judge may send them all to a jury.

If an accused insists on a right to a jury, he must be allowed his choice; and in all cases in which the sessions has no jurisdiction a jury must be had (with negligible exceptions).

A grand jury (in Ontario of thirteen persons) is empaneled to decide as to whether the accused shall be put upon his trial. In the sessions the county crown attorney prepares the indictment; in the supreme court a crown counsel appointed *pro hac vice* by the provincial administration.

Perhaps the most valuable provisions of the code are to be found in that part dealing with procedure. Forms of indictment are given which are declared to be sufficient; and these are of the simplest kind. I have before me as I write a manuscript note book of an eminent Canadian judge of about half a century ago; in that an indictment takes about three foolscap pages. I have as crown counsel drawn many indictments of nearly that length. An indictment under the code will be a line to two in length. Let me copy a few:

"The jurors for our Lord the King present that John Doe murdered Richard Roe at Toronto on May 17th, 1893."

"The jurors for our Lord the King present that John Doe stole an anchor from a ship called The Jane at Coburg on April 20th, 1894."

"The jurors for our Lord the King present that John Doe obtained by false pretences from Richard Roe a horse at Toronto on May 16th, 1895."

All counts of indictments are directed to contain and are sufficient if they do contain in substance a statement that the accused has committed an indictable offense therein specified. The statement may be in popular language and without any technical averments, and it is sufficient if it uses the words of the statute in describing the offense or any words sufficient to give the accused notice of the offense with which he is charged. No count is to be deemed objectionable because it does not give the name of the person injured, defrauded, etc., or the owner of property, or because it does not set out any document or words used, or means by which an offense was committed, or does not name or describe with precision any person, place or thing, etc., etc.

The substantive part of the code has done away with subtle hairsplitting over definitions of crime—whether the facts of a case show a crime to have been committed depends not upon the ideas of Hale and Hawkins, but upon the meaning of certain words used by parliament. So in procedure, the innumerable traps and pitfalls in the way of a crown counsel which had to be looked for and avoided are all gone; the pathway is clear; with the code in his hand and common sense in his mind he cannot make a mistake.

I remember, when a very young practitioner, getting a scoundrel of a client acquitted because the crown counsel had unwarily described the offense as having been "feloniously" committed whereas the statute did not make it a felony; and once, an equally rascally prisoner escaped my prosecution because I had inexactly called a certain document a "receipt."

If the accused cannot fully understand the charge against him—or if his counsel says he cannot—the court may direct particulars to be given. This is an exceedingly rare proceeding. The preliminaries to a trial by indictment almost invariably make it perfectly clear what is meant by the words of the indictment, even if an extremely critical reading of it may find some ambiguity. I once heard a solicitor general of the United States say that he never saw an indictment which he did not perfectly understand on the first reading, and very few in which he could not find ambiguity and un-

certainly after a few weeks' study. He would find some difficulty, with all his skill and ingenuity, in finding any uncertainty in the simple statement that A murdered B at Toronto on May 17th, 1914. What need is there of anything more? What difference does it make whether the murder was committed by poison, rifle, revolver or club?

Some of our judges think the grand jury should be abolished; it is a third wheel to the cart, no doubt, and if it had no other duties than passing upon bills of indictment, would not be missed.

The crown witnesses only are heard by the grand jury and a bare majority may find or ignore a bill.

When a bill is ignored, it may be brought before any subsequent grand jury at the option of the crown; if a bill is found, it is handed to the judge in open court and the jury are addressed by the clerk: "You are content that the court may amend all matters of form altering no matter of substance in this bill you have found?"

The prisoner is arraigned, dilatory pleas are disposed of, e. g., *autrefois acquit* or *autrefois convict*, in the usual way. Motions to quash the indictment or for particulars are got out of the way; we have no such things as technical defects, and if there is some error in form the court amends it then and there. In a very active experience, I have known of but one motion to quash an indictment, one plea of *autrefois convict*, and none of *autrefois acquit*, since the code came in force. The prisoner pleads; if guilty the case is over unless the court thinks the plea should not be accepted. We shall assume the plea is "Not guilty."

Four days before the opening of an assize or session, any one interested may have a copy of the jury panel so as to make any inquiry he may think proper concerning the jury-men.

Challenges are allowed (as at the common law), twenty in capital cases, twelve in certain others, that is, those which can be punished by imprisonment for more than five years and four in all other cases. These are peremptory challenges. Then there may be unlimited challenges for cause (I never but once saw one), on the ground that the juror's name is not on the panel, that the juror had been convicted of crime for which he was sentenced to death or imprisonment with hard labor or exceeding twelve months, that he is an alien



or that he is not indifferent between the King and the accused; but on no other ground.

The crown is allowed to challenge four peremptorily, but may direct any number of jurors to stand aside until all the jurors have been called, and of course may challenge for cause.

I have never seen it take more than half an hour to get a trial jury even in a murder case. I have never but once heard a juror asked a question; and it is the rarest of cases that the jury is not obtained before the names on the panel have been exhausted.

In all courts but the supreme court, the county crown attorney prosecutes; in the supreme court, at every assizes there is appointed by the attorney general of the province a barrister, generally a king's counsel, to prosecute all criminal cases at that sittings. Almost invariably a barrister from another part of the province is thus appointed.

The crown counsel, being the county crown attorney in the inferior courts and the specially appointed counsel in the supreme court, prepares the indictments and lays them before the grand jury, with the names of the witnesses to be called. The grand jury in our system cannot, *proprio motu* direct a bill to be prepared, but can pass only on what are laid before them by the crown.

The same counsel conducts the prosecution before the petty jury.

There is no disqualification of witnesses by reason of interest or crime. Every one charged with crime may give evidence on his own behalf, but cannot be compelled to do so. If he fails to do so, his failure can not be made the subject of comment by judge or prosecuting counsel. The wife or husband of an accused is competent but not compellable in the same way and with the same protection.

In cases of unnatural offenses, incest, indecent acts, seduction and like offenses, vagrancy, neglect of duties tending to preservation of life, rape, carnal knowledge of a girl under 14, bigamy, feigned marriages, etc., abduction, husband and wife are both competent and compellable witnesses. No disclosure can be compelled of any communication between husband and wife during their marriage. No witness is excused from answering any question upon the ground that an answer may tend to criminate him or may tend to establish a

liability to a civil proceeding. But the answer is not to be used against him in any criminal proceeding (except perjury in giving such evidence).

The witness may affirm if he has conscientious scruples against taking an oath, or says he has. If a child does not understand the nature of an oath his evidence can be taken without an oath, but a case must not be decided against an accused upon such evidence alone, it must be corroborated by some other material evidence.

The verdict of a petty jury must be unanimous. If the jury cannot agree, the court may call another forthwith, or may adjourn the second hearing to a future court, admitting the accused to bail or otherwise as the court sees fit.

Let us now look at this practice from an *a priori* point of view.

When the community decided that for its own sake the whole burden of avenging wrong should not be cast upon the individual, it at the same time and for the same reason decided that the alleged wrongdoer should not be punished except after having been proved to be guilty. It is not for the protection of the individual simply or primarily, but for the safety of the state that all civilized nations forbid the punishment of one accused of crime unless and until he has been found guilty thereof by a court. It is no privilege but a right that an accused has to be tried by such a tribunal, and if proof fail, to be set free.

In like manner he has a right to know exactly what he is charged with, and to have fair play in his trial. To let him know with what he is charged, it is right that the charge be put in black and white so that there can be no mistake about it. But surely the accused is rightfully entitled to nothing more in the way of a charge than a document from which he may know precisely what he is charged with.

There may have been a time in the history of English law when there was some advantage to be derived from the long and involved forms of indictment. They certainly were not necessary to tell the accused with what he was charged. The horrible barbarity of the common law at length moved the hearts of judges less brutalized, and they endeavored to mitigate the rigor of the common law. If this had resulted in modification of the existing criminal law by means of legislation, it would have been logical. But English-speaking



peoples are not much enamored of logic; they look for a working rule. The judges took another tack; they laid hold of trifling irregularities or defects to allow an accused to escape a terrible punishment. Everything was *in favorem vitæ*—except the substantive law, which was much more *in favorem mortis*.

Frankly I do not know any advantage to the state other than to allow a judge to pick holes in the indictment and to so acquit one he did not want to hang, that the common law indictment possesses. When we have gone into another stage of evolution and amended the cruel code of criminal law, why should we retain any of the technicalities and intricacies of the formal indictment? In our practice, the accused has almost always been before a magistrate and heard the witnesses against him; and he knows perfectly well what is the accusation against him. What else is he entitled to than a simple statement of the charge?

Is not the classical instance of an accused being acquitted because a lawyer laid a charge as “against the peace of state” instead of “against the peace of the state” revolting to our common sense? (Do not think I am criticising the decision, it may have been justified or compelled by legislation or authority.)

Is not the indictment in some states a relic of olden times not only useless but even exceedingly dangerous to the body politic?

The grand jury was once a valuable organ, it stood between the crown and the individual, and often between a powerful individual and one less so. In our own present system, an accusation may be made by any individual against any other. If an examining magistrate thinks that a *prima facie* case has been made out, the prosecution is taken up by the crown. No one can be prosecuted in assize or sessions without the consent of the crown represented by an officer responsible to the government. A grand jury then is not now needed to stand between a more and a less powerful person. To stand between the person and the crown meant something when “the crown” was an individual, the King or some appointee of his; but where—as in our system—“the crown” means the people, it savors of absurdity to think or speak of anything between crown and subject. If the grand jury had not other uses, it does not seem to me that it could



or should be retained. Where a responsible counsel certifies on behalf of the people at large that a prosecution should be had, there should be no hesitation in the court to entertain such a prosecution. I can see no more reason for a grand jury giving a decision that a criminal proceeding shall be had, than for such an organization deciding that a civil proceeding shall be taken.

I am wholly incompetent to discuss the manner of selecting juries in vogue in some of the States of the Union; the absolute distrust of fellow citizens exhibited by those accused of crime as well as by those entrusted with the prosecution is inexplicable to me brought up under another system. In some places much more time is often taken up in finding a jury than we take in the trial of the case itself. Last month I said to the Illinois State Bar Association:

"The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before I had gone to a Canadian city to hold the assizes on the same day that a few hours further along the same line of rail, but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury."

I was once present in a Buffalo court and saw two or three jurors of Canadian birth challenged by a counsel who was conducting a case against an Englishman. He did not know that a Canadian is no more an Englishman than a Texan is a Yankee; and seemed to imagine that a Canadian by birth would tend to favor an Englishman born under the same flag. This kind of logic is beyond the comprehension of us simple Canadians who believe in giving every man a "square deal."

Is the practice of days being taken up in getting a jury advantageous to the state? That is for the people of each state to answer.

Of course the intention as avowed is that jurymen shall be found who are not prejudiced—and if it is necessary to go through all this to obtain an unprejudiced jury, I presume the game is worth the candle. But is it necessary? Is this an *appendix vermiciformis*, or a useful organ? Every community must answer for itself.

Should an accused be compellable to give evidence against himself? No one reading the state trials but must be struck with the brutality with which those accused of crime were treated by both judge and crown counsel; and indeed the judge was not infrequently counsel for the crown, in fact. In those days even a witness was in great peril if he did not give the evidence expected or desired. It might well be unsafe to rely upon evidence given by an accused in that state of affairs. But we are far past that period. No judge would disgrace himself by inhumanity to an accused (of counsel I shall speak again), and why should not an accused be allowed to convict himself if he sees fit to do so? Evidence given under compulsion we might well object to, but why should not the state put an accused in the witness box and ask him questions? If he should see fit to answer, why should not his answers be allowed and used as evidence against him? He can give evidence on his own behalf if he wishes, why should not the people have the right to require him to go into the witness box for them.

In Civil cases it was long the law that no one could give evidence on his own behalf. About fifty years ago a change was made in England by 14 and 15 Vict., c. 99, after an experiment of allowing such evidence in certain courts, had proved successful, (1846) 9 and 10 Vic. c. 95; the change being completed in 1869 by 32 and 33 Vic. c. 68. Now any one may give evidence in his own case notwithstanding the fears of perjury, etc., which obsessed the ancient lawyers and now any litigant may give evidence on his own behalf, but his antagonist may insist that he shall go into the witness box for *him*. No real reason can be given why one accused of crime should not be allowed to give evidence on his own behalf, and yet it was but the other day that this was possible.

And why provide that the failure to give evidence on his own behalf shall not be made a matter of comment? Every jurymen knows the accused can, if he likes, testify on his own behalf; and as in a civil case the failure to testify on his own behalf of a party who must know the facts, may be and generally is the subject of unfavorable comment by judge and counsel, why should this not be allowed in criminal cases as well?



One reason why an accused should not be compelled to give evidence plausible but not, I think, sound, I can see. It may be that the accused fears cross-examination upon his story and perhaps his past. This is done in civil cases, and why not in criminal cases? If the credit of a witness is to be affected by his life, what difference is there in civil and criminal cases?

All this restriction is part of or intimately connected with the traditional law that no one should be compelled to condemn himself. There was some semblance of reason in such a rule when the criminal was not uncommonly one who had offended the powers that were, and too often it was to be feared that the self-condemnation was brought about by torture. But now the criminal is always the enemy of society, of the people and not of the king or government. No one desires the destruction of the accused because he is he, and irrespective of whether he has committed a real crime. The whole concern of the prosecution is to investigate whether the accused has committed an offense against the people; not only does the law not desire the punishment of an innocent man, it does not desire the punishment of a man who cannot be proved guilty.

Is there any sound reason for preventing the state from asking an accused his version of the facts?

So, too, in the case of husband and wife: the same reasoning applies subject to the right of husband or wife to decline to answer, and also the provision that no communication during marriage shall be disclosed. This last provision is introduced for ethical reasons. It is probably better that there should be full, free and frank disclosure and discussion between spouses than that in cases of alleged crime one should be compelled to disclose any such communication to the prejudice of the other. No doubt the rule comes from the common law doctrine that husband and wife are one; if it should ever be that marriage is considered just the same as any other contract and voidable at the option of the parties much of the reason of the rule would disappear, and communications between husband and wife would perhaps become like those between solicitor and client, discloseable when they compel husband and wife to testify against the other in certain crimes, why not in all?

I have spoken of the prosecuting counsel. Much of the dignity and propriety of a criminal trial must depend on him.



In our law, the theory is that counsel for the crown; whether the permanent officer, the county crown attorney, or the temporary, appointed for a particular assize or a particular case represents the people, in our terminology, the crown. It is his duty to lay before the court and jury all the facts no matter how they may tell; he must bring out those which may exonerate as well as those whichonerate the accused. Of course he is not to allow himself to be hoodwinked by those who, while affecting to tell the truth, are really twisting facts to help the prisoner, and equally of course, he must cross-examine the witnesses for the defense to find out how far they are to be relied upon; but when he has brought out all the facts and summed them up fairly for the trial tribunal, his duty is done, and he has no concern with the verdict. Concealment or suppression of facts, undue severity in cross-examination, unfair summing up, pressing for a conviction are bad form and against the ethics of the profession; they are quite certain to meet the disapprobation of the profession and the public (including the jury), and are more than likely to call down upon the offender the rebuke of the trial judge. In the existingstate of humanity the ardour of battle is to be expected now and then to cause conflicting counsel to transgress, but I can say from a long and varied experience that the instances are exceedingly few in which the prisoner can reasonably complain of the conduct of the crown counsel.

This is a reason for changing the old practice whereby the accused cannot be asked to enter the witness box.

If, indeed, his standing at the bar or before the public, if the probability of his continuing to occupy an office of dignity and importance,—if not of great emolument,—depended upon success in procuring convictions, it could easily be understood that a prosecuting counsel would naturally strain every nerve for a conviction, right or wrong. This, however, could only be under an essentially vicious system.

The former theory that a person who had once been convicted of a crime, or at least of perjury, should not be allowed to testify, we have got rid of, as you have in Wisconsin; and now none so poor a lawyer as to do it reverence. That relic of a former state of law the surgeon's knife of legislation has removed forever.

Expert witnesses we have; but they are, except by leave of the court, restricted in number to five on each side. We keep

them well in order, and confine the evidence to the exact point upon which they are to give an opinion. For example, the defense of insanity is available only to one who at the time of the alleged offense was "laboring under natural imbecility or disease of mind to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission is wrong." A medical expert is called to prove or disprove insanity. He is not allowed to express an opinion as to what should be done with the accused, whether he is likely to recover, whether he is "legally insane," or anything but the neat questions, "1—Was he capable of appreciating the nature and quality of the act or omission? 2—Was he capable of knowing that it was wrong, i. e., wrong in the sense of being contrary to law?" Reasons for the opinion of the expert may be and generally are asked; but in most instances the expert evidence takes up little time. — Perhaps I may add that in my experience it has little influence with the jury occasionally, indeed, less than with the judge. We have a hard headed lot to deal with on our jury-panels, not much given to sentiment and with a decided antipathy to homicide.

The result is that our criminal trials are not very long. I have known but one lasting more than four days, most do not last two, none before me has lasted for more than a day and a half.

We still retain the requirement that the jury must be unanimous in criminal matters. Why we should not be satisfied with the verdict of ten as we are in civil matters but insist on a verdict of the whole twelve, I cannot say. In civil matters it is the Province, in criminal, the Dominion which prescribes the practice. It may be that Ontario has made an advanced step ahead of the Dominion, or it may be that the determination of the Dominion *stare super vias antiquas* is wise conservatism.

Our Ontario system of requiring only ten jurors was introduced to prevent the disagreement of a jury by the unreasonable conduct of one or perhaps two jurors. It has now been in force for about twenty years (since 1895, 58 Vic. c. 16, s. 1), and no one would think of going back to the old system. Most of the inconvenience that might otherwise result from disagreements in criminal cases is obviated by a not uncommon practice of calling a new jury at once and



proceeding forthwith with the new trial. I have never known this to fail in bringing about a verdict. No such disadvantage has arisen from the present practice as to produce any popular demand for its modification; I cannot say that there is any body of judicial, professional or popular opinion looking toward a change.

It does not seem to be quite settled how far at the common law a proceeding in the nature of an appeal could be taken in criminal cases. That one tried for his life should have no redress when the judge in a court of oyer and terminer made a mistake or where the verdict was clearly against the evidence, while in a case involving a few shillings he might take the opinion of the full court and perhaps of the highest court in the land, was undoubtedly anomalous.

For a time we had in Canada the convenient practice of the trial judge reserving a case for the opinion of a Court in Banc upon matters of law arising during a trial. This had, however, the disadvantage that there was no means of compelling the judge to reserve a case, and while I never knew a judge to refuse to state a case when desired to do so, there was always danger of injustice being done. Our present system is for the judge to state a case on any question of law either on request of crown or defense or *proprio motu*. This case so stated comes at once before an Appellate Division of five judges. One Appellate Division or the other is always in session and consequently there is no delay; and a very few days will suffice to have the matter heard and disposed of. (The Chief Justice of the State across the Lake from Ontario is reported to have declined to sit to hear the Becker case because the decision might not be ready before his term expired, some months later. This would be impossible under our system.)

If the trial judge refuses to state a case, an application may be made to the Appellate Division to compel him to do so. If the Appellate Division think a case should be stated, sometimes the application is treated as the case which should have been stated and judgment given accordingly—this was done in a murder case in which I refused to state a case; a new trial was ordered. Or an order is made for a case and the trial judge states a case which is argued and disposed of without delay. The case may be amended during argument; the prisoner is not present and technicalities are ignored.



The court may confirm the ruling, order a new trial, pass the proper sentence, direct the discharge of the accused, or "make such other order as justice requires." No conviction can be set aside for improper admission or rejection of evidence or misdirection or other thing not according to law unless, in the opinion of the court some substantial wrong or miscarriage has thereby been occasioned at the trial. If the wrong or miscarriage affect some count only of the indictment, the court may give separate directions as to each count and pass sentence on any count not affected which stands good. If the Appellate Division should not be unanimous, the convicted person may appeal to the Supreme Court of Canada—a very rare proceeding. In theory also, any subject has the right to appeal to his majesty in council—which is still rarer, and indeed negligible.

The trial judge may also give leave to a convicted person to apply to the appellate division for a new trial on the ground that the verdict was against the weight of evidence. I know of but one instance of the kind, and that unsuccessful.

We have known no more formality, technicality or "frills" in criminal appeals than in any other; they are disposed of with speed and on the same principles and footing as civil appeals.

It may be of interest to know that the option given to an accused, in most instances, of trial by a judge without a jury is very commonly taken advantage of. In Toronto, in 1913, there were nine criminal cases tried in the supreme court, 118 in the sessions and 371 in the county judge's criminal court. It has been estimated that two-thirds of the cases triable at the sessions which come before the police magistrate in Toronto are tried by him; and a large percentage of those who before him elect a jury trial change their mind and are tried by the county court judge.

In our civil practice we are trying most cases without a jury. In the lowest court, the division court, less than one-fifth of one per cent are so tried. This may be due in part to the fact that in this court any litigant desiring a jury must deposit in court the probable cost (about ten dollars on the average), this expense forms part of his judgment if he is successful. In the intermediate court—the county court—in Toronto in 1913 eighteen per cent were tried by a jury; in the Supreme Court about twenty-six per cent. In

neither of these courts do the litigants pay for the jury. Year by year we are trying fewer and fewer cases with a jury.

It requires no argument to convince any thinking man that the two qualities of certainty and speed are of much greater value than severity of punishment as a deterrent. If every lyncher were certain to get ten years in the penitentiary and that within a year of his crime, lynching would become most unpopular; it would almost disappear. We have never had a lynching, and our mining camps never produced a Bret Harte hero. A reasonable certainty of ten years imprisonment beginning within one year of the offense would be more deterrent than a reasonable certainty of twenty years beginning five years after the offense, and either much more effective than a mere chance of hanging. Is not any system vicious which lends itself to delay? And is not a speedy system vastly preferable to one in all other respects equal, but dilatory? With us, as I told your Illinois brethren the other day, "we think in the Dominion, if a Canadian murderer is not hanged within a year of his crime, he is justified in complaining of being deprived of his just rights, given him by Magna Charta"—*Nulli \* \* \* differemus rectum aut justitiam.*

And why should one accused of crime be set free because a lawyer has made a blunder in putting something on paper or in omitting to put something on paper? If he has had full notice of the charge against him, full opportunity of seeing and hearing the witnesses, of producing witnesses on his own behalf and giving his own version if he wished to do so, then if the case is satisfactorily proved against him, what more should he have? Why should a trifling error in form or in procedure, not affecting the merits and not doing any real harm, be sufficient to enable a rascal to escape just punishment?

As has already been suggested, most of the rules which in some jurisdictions give effect to trifling defects have their origin in the dark times of the law when death was the penalty for a trifling theft. Humane judges *in favorem vite* seized every means and availed themselves of every loophole to let an accused escape from a too severe punishment, even if that involved letting him escape from all punishment. Can there be any good reason why such a course should be

followed now when the law is humane and the punishment is made to fit the crime?

Notwithstanding all due care and desire to do the right, the courts must admit that they are not perfect—the common failings of humanity are not at once put to flight on receipt of a patent. Circumstances may come to light which show that a fair trial has not been had. In our system the Minister of Justice is given the power to direct a new trial. This has been done at least once upon the discovery of new evidence. Or although the convict has such a degree of mental soundness as to come within the law, he may be so insane that it would be unwise to punish him by death. The Minister of Justice may (and where there is any ground to think there may be insanity, almost invariably does) cause him to be examined, and if he is really insane may recommend commutation, including imprisonment in the Criminal Lunatic Asylum.

During the French Revolution the power to commute punishment duly directed by the court was taken away from the authorities. One very celebrated and very horrible case occurred in which the condemned was certainly innocent and yet he must suffer because no one could interfere with the sentence of the court. That instance was enough (even if such an example had been needed) to show the necessity of vesting in some authority the power to commute punishment. This power is given to some one in every civilized state, generally to the executive head.

In our system, the judge before whom a criminal trial is had, must, if the sentence of death is imposed, send forthwith to the secretary of state a report of the case. He sends a transcript of the shorthand notes of the trial, with such other material as may be necessary. This goes to the Minister of Justice whose duty it is to examine the proceedings and to advise commutation or otherwise. In any other case the judge may report if he sees fit, and in any case he may make recommendations to the Minister. So, too, in the case of any one under sentence, however light or severe, the Minister may, and upon request always does, make inquiry into the case, obtaining a report from the trial judge, etc. Our Minister of Justice, it will be seen, has the functions of the Home Secretary in London.



I do not think it well to say anything of the substantive law.

If I were to be asked to give the salient points of difference of our practice and that of the ordinary state of the Union, I would say:

1—The abolition of the old and useless distinction between felony and misdemeanor.

2—The privilege given an accused (except in the case of a very few crimes) of being tried without a jury by a judge.

3—The abolition of all technicality in indictments and in all other proceedings, and generally the minimizing of form.

4—The speed with which a jury is had, a trial held, an appeal disposed of, and punishment begun.

Every state must choose for itself what it prefers. We have made our choice, and find it answers our conditions. I do not presume to advise any other people, but may be allowed to say to you what I said to another gathering of lawyers a few weeks ago. After speaking of the former condition of criminal law in England, I continued:—

“Accordingly, the prosecution of an alleged offender became a kind of sport. The prisoner had so much of a start; so many proceedings were forbidden to his pursuers; he might double and dodge and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

“This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the state included. Instead of its being a solemn inquiry by the state into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious, a subject for lurid newspaper writing. The provision made by the state for its own protection that no one shall be punished until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens

should fall. Time seems not to be considered of importance in many jurisdictions; and in one, the members of the Bar say openly that a conviction for murder is but the beginning of the criminal trial.

"Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate or wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment. Is all this good for the state? \* \* \* If the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of time he can make a case last, or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near yellow journal and its readers, all are in favor of it. But the man who has to pay for it, the sober minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? And is he not to be considered?

"If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, 'The men like it, the horses like it, and nobody can be certain that the fox does not like it.' But even fox hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport, too busy to be willing to waste weeks on an investigation for which days or even hours are ample. \* \* \* When a trial is set, we insist on it being proceeded with, with due diligence and reasonable speed."

When the people want a criminal trial to take the place of a free theatrical performance, they will prefer one method. When they want it to be a serious and dignified investigation by the state into an alleged offense against the state—the people—they may prefer another. Every country has the law it deserves.





# The Canadian Law Times

EDITED BY

A. H. F. LEFROY, K.C., M.A.

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3. The right to discharge water or other matter on a neighbour's land.

4. The right to go on a neighbour's land to draw water from a well.

The rights of riparian proprietors in an artificial water-course are not the same as the rights of riparians on the banks of a natural stream. They are acquired and not natural rights, and are dependent on the grant by which they have been acquired, or on the nature of the use if the claim is by prescription. An artificial water-course may have been made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream, etc. Coulson and Forbes, p. 130. It was not intended, however, to deal with artificial water-courses further than this distinction goes, and the law as to property in water generally is only touched in this Article in its main principles.

A. J. MCGILLIVRAY.



## THE FIRST MEDICAL CASE IN THE PROVINCE.

Before Upper Canada became a separate province, and in 1788, Lord Dorchester divided the country afterwards to be Upper Canada into four Districts, Lunenburg, Mecklenburgh, Nassau and Hesse, the chief part of whose inhabitants were in the settlements at and near Cornwall, Kingston, Niagara and Detroit respectively;—Toronto was then a trading post of no consequence.

In each District was instituted a Court of civil jurisdiction called the Court of Common Pleas: over each Court presided three judges, all laymen, but the Detroit people objected to laymen in their Court, and in 1789 William Dummer Powell, a lawyer in Montreal of Boston birth, was made first (and only) judge of that Court.

In the other Districts, however, the original scheme prevailed: in Mecklenburgh the judges were Richard Cartwright, Neil McLean and James Clark.

Before that Court in the summer of 1790 came the first medical case ever tried within the territory afterwards Upper Canada, and now Ontario.

Macauley and Markland sued James Connor, a surgeon (he is found in the United Empire list as "Surgeon, Hospital Mate") for £43 " 18s. currency (\$175.60) balance of account. On March 31st, 1790, the Court sat, all three judges being present—the Sheriff returned the summons duly served—the plaintiffs filed a declaration. Dr. Connor appeared and stated "that the accounts rendered him by the plaintiffs were very inaccurate and many charges made against him which he could not agree to settle in the state it was rendered him, and that the overcharges amounted to £1 " 11 " 6 " (\$6.30). Besides he claimed to have an account against Robert Macauley one of the plaintiffs for "medicines and attendance amounting to the sum of £50 " (\$200). He admitted in answer to a question from the Bench that the firm were not liable for a private debt of Macauley and that in any case Macauley had a private account against him not included in the amount sued for. The Court determined that they must take time to consider the merits of the case and ordered the parties to appear on the first day of July.

The plaintiffs did so, but the defendant did not, and according to the practice of the Court a default was entered against him; on the 3rd however he appeared in person and had the default removed, and an order made for trial on the following Monday, July 5th.

On that day, Robert Macauley produced his private account for a box of medicine against the defendant £60 (\$240), and this account was by order of the Court added to the amount demanded by the declaration. The defendant said the "said chest of medicines was not really worth sixty shillings," but admitted getting it—he produced his account against Macauley for "medicines and attendances in Cureing a broken Leg, amounting to £50." Macauley declared that "the Charge is exhorbitant for the Medicine and Attendance that have been given."

Connor "alleges that his charge is not extravagant nor without a precedent and that the Cure he performed was of a dangerous Nature and that he is Justly entitled to the Amount he demands for the said Cure."

He called a witness, Mr. Joseph Forsyth, who swore that he had "heard it publicly reported in Montreal that Mr. Murray had paid Dr. Bleak Fifty pounds for Cureing a Broken Leg, which was allowed by the Court in that District" whereupon the Court did "not consider themselves Competent to Judge of the Nature of the defendants charge without Consulting the oppinion of professional men upon the Subject and do therefore call upon Jas. Latham and Jas's Gill, Surgeons, for their oppinion."

Dr. Latham said that "charges Generally depend on the Circumstances of the patient and that he had known from Two pounds to One Hundred Guineas paid for cures of this kind"; and that "considering all the circumstances in this Case "he would think himself very Honorably paid by Thirty Guineas" and would think himself entitled to charge that amount.

Dr. Gill had only attended Soldiers, but Professional men in the Province charged from Ten to Seventy Pounds according to Circumstances, he would charge at least Ten Pounds for each Fracture for reducing it alone and for Medicine extra.

The Court took the case under consideration and on the following Thursday, July 8th, 1790. they gave judgment against the defendant for £13 " 6 " 6 currency (= \$53.30)

and costs. It is impossible to say how this sum was arrived at—perhaps the original bill for..... £43 " 18 " 0  
 was reduced by the amount claimed as reduction by defendant..... £1 " 11 " 6

to..... £42 " 6 " 6  
 and the defendant was allowed on the balance of his claim for Medical Service over the value of the Chest of Medicine, "not worth 60 shill." £29 " 0 " 0

leaving net balance..... £13 " 6 " 6  
 but this is a mere guess.

There are several matters of interest in this case which may be noted.

The personnel of the Court—three judges, not one, and these all laymen, not lawyers. Richard Cartwright came from New York State a United Empire Loyalist and became a merchant with a large business and trade connection; he was afterwards one of the members of the first Legislative Council of Upper Canada, being appointed July 16th, 1792, and was one of the two Legislative Councillors whom Simcoe charged (most unjustly) with Republican sentiments. He was the grandfather of Sir Richard Cartwright, James S. Cartwright, K.C., formerly Master in Chambers, both now deceased, and of John R. Cartwright, K.C., our efficient Deputy Attorney-General.

The other two judges were well-known residents and magistrates.

The practice was regulated by the Ordinance passed at Quebec of April 21st, 1785, 25 George III., cap. 2, as modified by the Ordinance of May 7th, 1789, 29 George III., cap. 3. Where, as in this case, the claim was for more than £10 sterling, the plaintiff drew up a declaration setting up his causes of complaint and presented it to a judge. The judge made an order which was presented to the Clerk of the Court who issued a Writ of Summons commanding the defendant to appear upon a day named. A copy of the Writ and of the Summons was served by the Sheriff, and the defendant appearing, the matter was tried. Either party might appear in person, or by attorney, or by written and formal Power of Attorney have some other layman appear and act for him.

By the Ordinance of 1789, sec. 11, in cases in the new Districts any evidence in cases where the title to the free-



hold was not in question was allowable which satisfied either "the ancient or present Laws of this Province," (*i.e.*, the French Canadian Law) or "the Laws of England."

Either party might call for a jury: but unless a jury were demanded, the case was tried by the judges.

In allowing the set off or counterclaim to be set up, the Court went far beyond the limits at that time observed in English Courts: the evidence as to the amount allowed a surgeon in the Court at Montreal would not now be allowed in any British Court, being the grossest hearsay.

And in conclusion notwithstanding the increase in professional fees and the high price of living, many a medical man even now would consider £50 or \$200 a pretty good fee for setting a broken leg—much more 100 guineas.

WILLIAM RENWICK RIDDELL.

## COSTS.

A perusal of the last Volume (7), and of the first few numbers of Volume 8 of the Ontario Weekly Notes suggests some observations upon the present practice and apparent tendencies in the exercise of the judicial discretion as to costs given by section 74 of the Judicature Act.

Statistics are, of course, of little value on such a question, but the following figures are not without interest. Their precise accuracy is not vouched for, but the errors, if any, are so slight as to be immaterial.

Excluding vendor and purchaser applications, and motions for construction of wills or by trustees and executors for advice, the costs of which are governed by special considerations, and excluding also interlocutory proceedings of all kinds, there appear to be 334 reported cases in Volume 7. In 38 of these—that is, in more than 1 case out of every 9—the successful party has been deprived of his costs, and these do not include cases where costs have been withheld on the ground of divided success. This by itself gives cause for reflection. But 148 of these cases were judgments in appeal; only 186 were judgments of first instance. And a refusal to give costs is more common in the latter than in the former class of cases, since, as a general rule, however unmeritorious the conduct of the opposite party, a litigant, like a dog, is entitled to only one worry, and bites twice at his peril. Dividing the cases in this way, it will be found that in 28 out of 186 judgments of first instance—that is, in more than 1 case out of every 7—the successful party has been deprived of his costs. In appeals the proportion is only 1 case in every 15, but in 3 of the 10 cases in appeal the deprivation was made to cover also the costs below.

Now, what are costs? Are they an indemnity for expense necessarily incurred in enforcing a legal right, or resisting an unfounded claim? Or are they in the nature of a bonus for the performance of certain indeterminate and unclassified works of supererogation, not affecting the determination of the legal issues, e.g. being “a little generous” (*Hunt v. Emerson*),<sup>1</sup> or being “business-like” (*Denton v. Tossy*),<sup>2</sup> *King Construction Co. v. Canadian Flax Mills*,

<sup>1</sup> 7 O. W. N. 15.

<sup>2</sup> 7 O. W. N. 153.

# The Canadian Law Times

EDITED BY

A. H. F. LEFROY, K.C., M.A.

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**CANADIAN GOVERNMENT MUNICIPAL  
AND CORPORATION BONDS**

On August 30th last, the British Foreign Office issued the following statement:—

‘Judgments recently have been delivered by the German prize court at Hamburg in the cases of the steamships *Maria* and *Batavier V.* The *Maria*, a Dutch vessel, was carrying a cargo of wheat shipped from Portland, Oregon, to Belfast and Dublin. She was captured and sunk by the *Karlsruhe* (a German cruiser) in the Atlantic on September 21st. The *Batavier V.*, a Dutch vessel, bound for London, was captured in the North Sea on March 18th and taken to Zeebrugge on suspicion of carrying contraband.

‘The sinking of the *Maria* was justified by the German prize court on the ground that, having regard for the place of capture, the commander of the *Karlsruhe* was unable to take the vessel into a German port or a port of an allied power, and so acted pursuant to article 113 of the German naval prize regulations. This was said not to require any further explanation and payment of indemnity to the owner was refused.

‘The judgments shew that in considering the question of destination of conditional contraband the German prize court held that it is to be guided by a communication of the chief of the general staff of the navy, addressed to the court on August 17th, 1914, concerning ports to be regarded as fortified places or as bases of operations and supply for the British armed forces in Great Britain, issued by ‘supreme command.’ As the court in other cases held that such places as Ipswich, Poole, Barrow-in-Furness and Grangemouth are bases or fortified places, it may be inferred that these are included in the list referred to.

‘In order to rebut the presumption thus set up that conditional contraband destined for such places is intended for military and not for civil use, the court held that counter proof must satisfy the most rigorous conditions. It would only be possible to furnish it in rare cases. With regard to the cargo of wheat aboard the *Maria* they held that there was no means of ascertaining with the least certainty what use the wheat would have been put to on the arrival of the vessel at Belfast, and whether the British Government would not come upon the scene as a purchaser.

‘The effect of these decisions appears to be to abolish in practice the distinction of absolute and conditional contraband of war.’

## THE DUEL IN EARLY UPPER CANADA.

That part of British America which was to become Upper Canada was, before the termination of the American Revolutionary War, almost uninhabited. At the close of that War, a considerable immigration took place<sup>1</sup> of those who had taken the part of the Crown in that conflict, United Empire Loyalists as they were called, driven out with what they considered injustice and what was certainly cruelty by their quondam brethren.

These settlers brought with them their English law and their customs; and although in theory French Canadian law was in force till 1792, the practice was in many cases far different.

Along with other customs imported, was duelling; and this was not at all diminished by the circumstance that many of those placed in positions of authority, when in 1792 the province was incorporated, were Englishmen who had come from across the Atlantic to make a new home in the wilds of Upper Canada.

The civil law of England was formally introduced into Upper Canada in 1792; the criminal law of England had always been in force in all Canada from the time of the Conquest in 1759-60.

By the law of England, and therefore of Canada, a deliberate duel was unlawful—as Blackstone sententiously puts it: ‘where both parties meet avowedly with an intent to murder, thinking it their duty as gentlemen, and claiming as their right to wanton with their own lives and those of their fellow creatures, without any warrant or authority from any power either divine or human, but in direct contradiction to the laws of God and man . . . the law has justly fixed the crime and punishment of murder on them and on their seconds also.’<sup>2</sup> And such was the law laid down by Sir Matthew Hale, “as correct, as learned and as humane a judge as ever graced a bench of justice.”<sup>3</sup>

<sup>1</sup> Nearly all the immigrants settled near the banks of the international rivers—on the left bank of the St. Lawrence were three main nuclei, at what are now Cornwall, Brockville and Kingston; on the Niagara was Newark, now Niagara-on-the-Lake. On the Detroit River, the loyalists remained to a great extent at Detroit until it passed out of British hands in 1796: then many, but by no means all, crossed the river.

<sup>2</sup> Blackstone's Commentaries, vol. IV., p. 199.

<sup>3</sup> Hale's Pleas of the Crown, vol. I., p. 452.



While this was undoubtedly the law, it was in our early days not applied very vigorously. There was the "unwritten law" that if the duel was fair in all respects, the survivor and the seconds should not be convicted. Accordingly, although the law was always laid down accurately by the presiding judge, the Crown Counsel, if the duel was a fair one, never pressed for a conviction; and the jury knew what was expected of them.

There were three—or perhaps four—duels which made considerable noise in their day and are not yet quite forgotten.

In 1800, January 3rd, John White, the first Attorney-General of the province, and John Small, the Clerk of the Executive Council, met behind the Government Buildings,<sup>4</sup> in a grove on Palace (now Front) Street at the foot of what is now Berkeley Street, Toronto,<sup>5</sup> and White received a wound above the right hip which proved fatal in a very short time.

White was an English Barrister who, being appointed Attorney-General of the new province, came to Upper Canada with the first Chief Justice Osgoode. He was elected member of the first House of Assembly, representing the Riding of Leeds and Frontenac, but was not re-elected. He was a diligent, painstaking official, but apparently was unable to keep out of trouble: *e.g.*, in 1799, he had to apply to the Court of King's Bench for protection against Captain William Fitzgerald of the Queen's Rangers, who had threatened him and challenged him to a duel.<sup>6</sup> But he was not always to be so fortunate; he spoke slightly of the wife of Major John Small, and, failing to withdraw his imputations, he was challenged and shot by Small.

Major Small was an Englishman from Cirencester who came to Canada as Clerk of the Executive Council: he afterwards became Clerk of the Crown and Pleas. He survived till 1832, filling his official position with much credit.

White was buried in his garden on his own lot in York (Toronto) east of Sherbourne Street and near Bloor Street.

<sup>4</sup>These were the original public buildings, destroyed by the American troops in 1813. It was in retaliation for this and similar acts of gratuitous vandalism that the American Capitol was destroyed (in part) by the British troops.

<sup>5</sup>The streets running south toward the bay at that time went to the edge of the water; it was not till the Grand Trunk Railway came through, in the 50's, that the Esplanade was constructed.

<sup>6</sup>This appears from the Manuscript Term Books of the Court of King's Bench (commencing in 1794) still preserved at Osgoode Hall, Toronto.

In 1871, his bones were turned up by labourers digging out building sand and were reverently deposited in St. James' Cemetery by Mr. Clarke Gamble, Q.C.

Small was the ancestor of the well-known and highly esteemed Toronto family of that name. He seems to have acted in all respects in the manner the rules of honour of his times demanded of a gentleman.

He was tried for murder, January 20th, 1800, at York (Toronto) before Mr. Justice Allcock and a jury; and, the duel being a fair one, he was promptly acquitted. The foreman of the jury was William Jarvis, father of Samuel Peters Jarvis, whom we shall meet later on.

Early on the morning of October 10th, 1806, William Weekes and William Dickson, both prominent lawyers, met behind a bastion of old Fort Niagara on the American side, and Weekes received a pistol wound so severe that he died the same evening.

Weekes was an Irishman who late in the eighteenth century came to New York, where he was a follower of the notorious Aaron Burr. Making his way to York, Upper Canada, he was called to the Bar in 1799,<sup>7</sup> and at once obtained a good practice. He joined the well-known judge, Thorpe,<sup>8</sup> in his opposition to the Government of the day and was elected a member of the House of Assembly. Mr. Justice Thorpe presiding at the Court of Assize and Nisi Prius at Niagara (Newark), Weekes in an address as Counsel made a vicious attack on the Government without objection from the Bench—indeed it seems to have been expected by the judge that such an inflammatory address would be made. Weekes was followed by Dickson who made as virulent an attack on Weekes as Weekes had made on the Government.<sup>9</sup> Nothing came of this for a few days, but one night spent by Weekes and the judge together in a neighbouring tavern seems to have developed a plan for the humiliation of Dickson. Weekes was a bachelor without encumbrances; Dickson had

<sup>7</sup> Weekes was the first to be called to the Bar by the Law Society of Upper Canada, who had not been in practice when the Act creating the Law Society came in force; his name was often spelled "Weeks."

<sup>8</sup> As to Mr. Justice Thorpe, see *The Journal of the American Inst. of Criminal Law and Criminology*, vol. IV., p. 12, May, 1913, where a fairly full account is given of him.

<sup>9</sup> Curiously enough Weekes and Dickson were great friends: in the early part of this year, March 5th, 1806, Dickson was made a "Bencher" or Governor of the Law Society on the motion of Weekes. They were, moreover, of the same stripe of politics, Weekes being by far the more outspoken.

a wife and a large family of small children; he was moreover a canny Scot; and the conspirators thought he would decline a challenge. Accordingly a challenge was sent; and somewhat to Weekes' dismay it was promptly accepted, with the result we have seen.

Weekes was buried at Niagara. The administration of his very considerable estate was one of the scandals of that early time and was the occasion of one of the earliest private Acts in our Provincial history.

Dickson became a member of the Council and a man of considerable influence in public affairs; he is best known from the part he played in the prosecution—and persecution—of Gourlay.<sup>10</sup> Of course Dickson was not prosecuted for his part in the duel, the crime (?) not being committed in Upper Canada.

The next duel probably caused more stir at the time, and afterwards, than any other similar event in our early history.

In 1815, Mr. Samuel Peters Jarvis went from York to Quebec with his youngest sister to place her in a boarding school there. At the request of Mrs. Thomas Ridout her mother, he also took along Miss Ridout who was to be placed at the same school. On arriving at Quebec he called upon Miss Ridout's brother, Mr. Thomas G. Ridout, an officer in the Commissariat Department who took the young girls under his protection. Ridout was to pay Miss Jarvis' accounts and draw upon her brother for the amount.<sup>11</sup> The following year Mrs. Ridout visited Quebec, and through some misunderstanding got the idea that her son had been obliged to pay for Miss Jarvis' support without reimbursement by Jarvis. She told this to some people and it came to Jarvis' ears. Jarvis wrote to her husband; who was Surveyor General of the Province, demanding a contradiction of the story; he handed the letter to his son George (afterwards Treasurer of the Law Society) who at once wrote Jarvis, saying, "for any imaginary injury received from any part of my family, I am ready to answer." Jarvis demanded an apology or

<sup>10</sup> Robert (Fleming) Gourlay, the "Banished Briton" who was banished from Upper Canada in 1819 largely through the instrumentality of Dickson. His offence was in the main his criticism and defiance of the authorities; the proceedings though frequently attacked as improper and unlawful were in my judgment wholly regular and authorized by the statute law, however unwise they may have been, and, *me judice*, were.

<sup>11</sup> These accounts, or some of them, are still preserved in the Public Library, Toronto, and form interesting reading.



"meet me with your friend Saturday morning next seven o'clock at the Five Mile Meadow opposite Brown's Point." Ridout accepted "of the terms contained in the latter part of your letter if it be possible to reach the appointed place within the period limited." Accident prevented this duel; another meeting was arranged; but Reverend Dr. Strachan (afterwards the first Anglican Bishop of Toronto), a friend of both parties, succeeded in bringing about an amicable settlement. On November 16th, 1816, both signed a document whereby Jarvis withdrew the letter to the Surveyor General, the elder Ridout; and it was agreed that "a letter shall be immediately written to the Surveyor-General requesting him to give complete contradiction to the reports circulated by Mrs. Ridout to the prejudice of Mr. Jarvis, which it is understood the Surveyor-General is to give." This was done and the trouble blew over for the time.

The hard feelings between the families were not, however, abated. In the following year, John Ridout, a student in the Law Office of his brother George and not quite of age, was conducting a law suit against Jarvis' father, and Jarvis was trying to settle the action. On one occasion Jarvis ordered Ridout out of his office;<sup>12</sup> a few days thereafter the two met on the street; Ridout struck Jarvis several times with a stick and shattered the bones of his right hand. Jarvis knocked him down with a blow from his left, and the fight continued until the parties were separated by Captain Fitz-Gibbon<sup>13</sup> and Dr. Horne.<sup>14</sup> A few days after Mr. James E. Small<sup>15</sup> waited on Jarvis on behalf of Ridout. Jarvis promptly accepted the challenge, and at daylight next morn-

<sup>12</sup> Jarvis claimed that Ridout was unbearably offensive and even insulting—there was no third party present and we have not Ridout's side of the story. No one, however, doubted Jarvis' integrity and sense of honour.

<sup>13</sup> One of the heroes of the war of 1812-14, an Irishman who died a "Poor Knight of Windsor." Many of his descendants still live in Canada.

<sup>14</sup> Robert Charles Horne, an Englishman and a member of the Royal College of Surgeons, was an army surgeon in the war of 1812-14. When his regiment, the Glengarry Light Infantry, disbanded at the close of the war, he came to York (Toronto). It is not quite certain whether he engaged in general practice but he was made Surgeon of the North York Militia. He was appointed a member of the Upper Canada Medical Board to examine candidates for license to practice medicine. At different times, he was editor and publisher of the Upper Canada Gazette, King's Printer, and Cashier of the Bank of Upper Canada. A strong Tory, his house was burned by the Radicals in the short-lived rebellion of 1837-8. He died in 1845.

<sup>15</sup> Son of Major John Small and afterwards Treasurer of the Law Society of Upper Canada.

ing went with his second, Mr. Henry John Boulton<sup>16</sup> and met Ridout and his second, Small, at Chief Justice Elmsley's barn, not far from the north-west corner of Yonge and College Streets, Toronto. Waiting at the barn until a shower was over, the principals were placed eight yards apart; it was agreed that the signal should be "one, two, three, fire," but that on no account was either party to raise his pistol till the word "fire." Mr. Small pronounced "one," and was in the act of pronouncing "two" when Ridout raised his pistol and fired at Jarvis; he then left the ground in a direction away from Jarvis. Whether this was due to nervousness (as is likely) or not, Jarvis insisted to the end of his life that it was a deliberate attempt at foul play. Ridout was rebuked by his second and directed to take his place. He said: "Yes I will, but give me another pistol;" a loaded pistol was given him, but after a conference between the seconds, taken away later, as "Jarvis was entitled to his shot." The second pronounced the signal agreed upon and Jarvis fired, Ridout fell, was carried into Chief Justice Elmsley's barn and there died in a very short time. The pistols used on this occasion are in the possession of Æmilius Jarvis, Esq., of Toronto, grandson of the surviving principal. They are long and heavy, carry a large bullet, and are most deadly weapons.

Jarvis was arrested the same day and taken to prison, where he remained till the October Assizes at York.

He was arraigned at York before Chief Justice Powell,<sup>17</sup> the Attorney-General, D'Arcy Boulton, receiving permission to retire from the case as his son had been concerned in the matter as second. The Solicitor-General, John Beverley Robinson, was absent; and the judge himself examined the

<sup>16</sup> Afterwards Solicitor-General of Upper Canada, and Chief Justice of Newfoundland. He was a son of Attorney-General (afterward Mr. Justice) Boulton.

<sup>17</sup> William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England, and on the continent. He took part in the siege of Boston on the Loyalist side but afterwards went to England and studied in the Middle Temple. He came to Canada in 1779, received a license to practice and did practice law in Montreal. Being created First Judge of the Court of Common Pleas for the district of Hesse, he went to Detroit in 1789; when the Court of King's Bench in Upper Canada was organized under the Statute of 1794, he was made the Senior Puisne Justice. He became Chief Justice in 1815 and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature, he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813.

Jarvis afterwards married his daughter Mary who had been engaged to the young Attorney-General John Macdonell, who met a hero's death at the battle of Queenston Heights in 1812.

witnesses. The jury found a verdict of "not guilty" after a few minutes consideration, although the charge "was anything but indulgent to the prisoner and was so considered by most of the persons present in Court."

Small and Boulton, who had been indicted as accessories, were present, and as a matter of course discharged on the verdict acquitting the principal being pronounced.

The unhappy mother whose unguarded words were the beginning of the troubles between the families—"the beginning of strife is as when one letteth out water"—never forgave either principal or second for her son's death; for years she used to wait after the morning service at the door of St. James' Cathedral until Boulton came out and would then solemnly curse him for his part in what she called the murder of her son.<sup>18</sup>

This duel was recalled some years later. Francis Collins, an enthusiastic Irishman of strong Radical leanings, was conducting the 'Canadian Freeman,' a newspaper strongly opposed to the Government. Early in 1828, he made attacks on Henry John Boulton (now become Solicitor-General) in connection with the duel in 1817 in which he had acted as second. A bill of indictment for libel was found against Collins for these publications and he was arrested. Appearing in Court before Mr. Justice Willis<sup>19</sup> he made a violent attack upon the Attorney-General, John Beverley Robinson, for prosecuting him while he took no proceedings against Boulton for "a crime that the law of England calls murder, committed ten or eleven years ago." The judge sent Collins before the Grand Jury, who speedily found a bill against Boulton and Small, the two seconds; they were arrested but admitted to bail. Collins applied for Robert Baldwin<sup>20</sup> to conduct the prosecution, which he did.<sup>21</sup> The trial lasted

<sup>18</sup> *Ex relatione* Sir Glenholme Falconbridge, the present Chief Justice of the King's Bench.

<sup>19</sup> John Walpole Willis, son of the Dr. Willis, in whose care King George III. was put when he was insane, was a Justice of our Court of King's Bench. He fell foul of the Governor and was "amoved" in 1828. Afterwards he became a Judge in Demerara and in New South Wales; from the latter position he was also removed and finally; he survived until 1877. See an article "The Court of King's Bench in Upper Canada, 1824-1827," by the present writer, *Canada Law Journal*, pp. 126 (1913).

<sup>20</sup> The Honourable Robert Baldwin, an eminent lawyer, but still more eminent for his labours in the cause of responsible government in Upper Canada, the founder and exemplar of the "Baldwin Reformers."

<sup>21</sup> In those days no one could conduct a criminal prosecution but the Attorney-General or Solicitor-General, who derived no small income from that source. Baldwin was specially retained under the circumstances of the case.



two days and resulted in an acquittal, the jury being out only ten minutes.

The other duel which I propose to speak of was fought in 1833; it is often, but inaccurately,<sup>22</sup> called the last duel in Upper Canada.<sup>23</sup>

About the time of the Jarvis-Ridout duel, there came to the Township of North Sherbrooke (in Lanark County) a number of immigrants generally called the "Radical Settlers." One of them, poor but prominent and influential, was Ebenezer Wilson, who had been a mill-superintendent in Scotland. His oldest son by a second marriage was John Wilson, born in Scotland in 1809, and emigrating with his father.

Young Wilson, when teaching a small school, was brought to the attention of James Boulton,<sup>24</sup> a practising attorney in Perth, who took him into his house, allowing him to pay for his board, etc., by teaching Boulton's little child. He was admitted to the Law Society, Easter Term, 11 George IV, i.e., 1830; another student, Robert Lyon, who had been admitted a year sooner, "Michaelmas Term, 10 George IV, 1829," was in the office of Mr. Thomas Maybee Radenhurst, also in practice in the same town.

Bytown<sup>25</sup> (now Ottawa), at that time was small but of growing importance and had a good deal of legal business. That part of the country had not yet been set off as a District and all the Courts were held at Perth; the Perth lawyers mentioned had branch offices in Bytown and occasionally sent their older clerks to attend to them.

<sup>22</sup> Since the text was written I have been informed by a gentleman, formerly a Postmaster-General of Canada, that two medical men (whose names he gave me) fought a duel with pistols at Bond Head, in the County of York, Upper Canada, in the early 40's (or at least after 1837).

<sup>23</sup> While I cannot lay my hand on any written report, contemporary or otherwise, of a subsequent duel, it is quite certain that at least one of our public men enjoyed the reputation of having fought several duels later than this. It is more or less common report that duelling continued till about the 50's.

Many myths have arisen about the Wilson-Lyon duel; the present account is largely derived from the Chief Justice's notes (still preserved at Osgoode Hall), of the trial of Wilson and Robertson, indicted for murder.

Several other sources of unquestionable reliability have been made use of, and it is believed that the accuracy of the account here given, can be depended on.

<sup>24</sup> Boulton was a man of some prominence in the profession; he afterwards removed from Perth to Niagara, where he practiced for some time.

<sup>25</sup> Called after Colonel By, the British Engineer, who built the Rideau Canal from Ottawa to Kingston.

The two young men were together in Bytown in 1833, when one day Lyon spoke disparagingly of a young lady of most estimable qualities and high character who was a member of the household of a Mr. Ackland in Perth. Wilson informed Mr. Ackland of this statement in a letter; he mentioned it to several persons and it came at length to the ears of another young lady of whom Lyon was *epri*s. This young lady on his return to Perth, treated Lyon coolly, and at length told him of what she had heard. Lyon met Wilson, demanded an explanation, and as Wilson was explaining Lyon knocked him down, calling him a lying scoundrel. On the advice of his friends and much against his own inclination, Wilson challenged Lyon. Wilson's second was Simon F. Robertson, another law student and a fellow student of Lyon's (admitted Trinity Term 1 and 2 Wm. IV, 1831) and Lyon's second was a relative of his, Henry Le Lievre.

On the following day, June 13th, 1833, the parties met in a ploughed field on the right bank of the River Tay under a large elm three and a few feet beyond the dividing line of the Districts. It was raining hard and both missed on the first fire (though Lyon was said to be a crack shot); and Wilson was ready, indeed anxious, to allow the matter then to rest. Le Lievre, however, insisted on another shot. On the second exchange of shots Lyon fell mortally wounded and died in a few minutes on the ground. Le Lievre fled but Wilson and Robertson gave themselves up.

Le Lievre was much the eldest of the party, Lyon was not twenty and Wilson and Robertson but a few years older.

The duel had been fought in the Johnstown District, though all parties resided in the Bathurst District; the two young men were accordingly tried at the ensuing assizes at Brockville on Friday, August 9th, 1833. At that time and until 1841 those accused of felony were not allowed to defend by counsel; the young law students defended themselves and were acquitted.

The presiding judge was Chief Justice Robinson, whose note book is preserved at Osgoode Hall. It is noteworthy that it was proposed to ask the first juror whether he had expressed or did entertain opinions unfavourable to the prisoners. The question was not allowed; our law does not permit such practice. It is very rarely that in our Court it is even suggested, though the proceeding is very common, indeed almost universal, in many of the States of the Union.

In my own experience of over thirty years, I have heard such a question only once and that by a very young barrister (who never did it again.)<sup>26</sup>

The proceedings at the trial are a perfect example of the course taken in such cases; the presiding judge allowing a mass of testimony to be given explaining the circumstances out of which the duel had arisen, what was said and done by each party, *etc., etc.*, everything which would shew that the prisoner did not wantonly seek a duel; although he carefully notes (and no doubt said at the time) that "it is not evidence."

At the trial it was proved that Wilson detested duelling, but that on being knocked down by the taller, heavier, and more powerful Lyon, he felt himself bound to send a challenge in order "to maintain his standing in society." His master, James Boulton, testified that Wilson was very sensitive as to what was thought to be "his humble origin"—he was the son of a poor farmer—that consequently he "felt it the more necessary to be tenacious of his character and scrupulous about preserving it from taint . . . than if he had been of a higher walk; he would have risked all this and treated it with contempt." Several witnesses swore that, had he not challenged, he would have been exposed to be contemptuously treated by his young companions and others—which gives us a vivid view of society at that time. It seems to have been arranged that Wilson should "explain away the effect of his letter" and Lyon should apologize, but apparently Lyon subsequently refused to implement this agreement.

It is impossible not to recognize from the evidence that Le Lievre was the real author of the mischief. He had been

<sup>26</sup> The proper practice is to challenge for cause and prove prejudice *aliunde*. See *R. v. Peter Cook*, 13 St. Tr. 334; *R. v. Edmonds* (1821), 4 B. & Ald. 471, 492.

The case referred to was *The Queen v. Mrs. Bell*, at the Ottawa Assizes, before Mr. Justice Robertson. I was of Counsel for the Crown and upon the prisoner's counsel desiring to examine the jury-men, I stated to the Court that although the practice was wholly irregular, yet in view of the great newspaper notoriety the case had received and the atrocious character of the crimes charged, I would not object. Mr. Justice Robertson, with great reluctance yielded to the request, upon this consent. No juryman was rejected; the prisoner was convicted and sent to the penitentiary for life. The length of time many American Courts consume in obtaining a jury is a standing marvel to Canadians. I have never seen it take more than half an hour with us.



very attentive to the maligned young lady<sup>27</sup>; but she had given him his congé and received the addresses of Wilson. When Lyon received the challenge, he stated that he had said what he had to Wilson only to tease him and had not supposed that he would take it seriously. He had asked a Mr. Muir to act as his second, but Muir refused, and he took Le Lievre; then the meeting being postponed until the evening, Lyon refused to carry out the arrangement which had been made, and the parties met about six p.m.

After the first exchange of shots, Dr. Hamilton went forward to the seconds and desired to bring about a reconciliation. Le Lievre at once said a reconciliation was impossible.<sup>28</sup> Dr. Hamilton then desired to speak with Lyon, but Le Lievre said he could not until the pistols were loaded.

<sup>27</sup> She was Miss Elizabeth Hughes, the daughter of the Reverend David H. Hughes, a Unitarian Minister, at one time head master of a classical and mathematical school at Kingsbridge, Devon, England, and afterwards pastor in charge of Vicarage St. Chapel, Yeovil, Somerset. He came with his children, Elizabeth and David John, to Canada in 1832, and died of cholera at Coteau, on his way to the Perth Settlement. Mr. Gideon Ackland, with whom the Hughes family were acquainted, and whose wife kept a school in Perth, took the orphans into his home in that town. Ackland was then a law-student (having entered the Law Society, Mch. Term, 2 Will. IV., 1831); he was admitted an Attorney June 27th, 1836, and called to the Bar June 14th, 1837; he practiced in St. Thomas. Miss Hughes became a teacher in Mrs. Ackland's School, in Perth. The boy, who was only twelve, was adopted by Ackland, and after working for a time as "Printer's Devil" he studied law under Wilson (then become his brother-in-law): was admitted and called August 2nd, 1842. After a successful practice, he became Judge of the County Court of the County of Elgin, at St. Thomas, in 1853; retiring in 1903, after half a century of faithful service, he lived in honour until this present month, dying April 14th, 1915. According to the recollection reduced to writing some years ago, of Mr. Cromwell, a member in 1833, of the household of Ebenezer Wilson, John Wilson was engaged to another young lady; however that may be, he afterward married Elizabeth Hughes, and she survived him, dying in Toronto, February 12th, 1904. She treasured to the last resentment against Lyon, her traducer. I have been informed that meeting a gentleman of that name and family on the street car in Toronto towards the end of her life, she could not conceal her embittered feelings.

<sup>28</sup> While it is reasonably certain that the fatal result of this duel was due to Le Lievre, he acted *secundum artem*.

In the Code settled by the Gentlemen Delegates of Tipperary, Galway, Mayo, Sligo and Roscommon at the Clonmell Summer Assizes, 1775, generally agreed to and followed throughout Ireland and in substance elsewhere, Rule 5 reads as follows:—

'As a blow is strictly prohibited under any circumstances amongst gentlemen, no verbal apology can be received for such an insult: the alternatives therefore are—first the offender handing a cane to the injured party, to be used on his own person, at the same time begging pardon; second, firing on until one or both are disabled; or thirdly, exchanging three shots, and then asking pardon, without the proffer of the cane.'

Lyon had not, of course, taken the first alternative and the firing must necessarily proceed, if the Code was to be adhered to.

See 'Personal Sketches of His Own Times,' by Sir Jonah Barrington, 1830, vol. II., pp. 16, 17.

Notwithstanding this, he spoke to both principals. Wilson seemed very desirous of settling, but Lyon said it was impossible.

The Chief Justice has written out his charge, which to a lawyer at least is of extraordinary interest. He begins with the serious nature of the duty of judge and jury and warns the jury against being led away by their feelings. He then defines with perfect legal accuracy the nature of the offence charged and the criminality of the duel, but he inserts the significant sentences:—"The practice of private combat has its immediate origin in high example, even of Kings. Juries have not been known to convict when all was fair,<sup>29</sup> yielding to the practices of Society . . . that sometimes no one being present the fact could not be proved at whose hands the party fell, . . . at other (times) they may have felt it difficult to infer that malice aforethought essential to murder." He deals with the facts of the duel and then with the antecedent facts "not as legal evidence but as the only palliative the prisoners could offer and was usually heard." After congratulating the prisoners on being "so capable of defending themselves" when they were prevented by law from addressing the jury by counsel, he adds, "Wilson was of humble origin and saw his prospects blasted if he submitted to the degradation and was impelled by the usages of Society and the slights he had partially felt or foresaw to adopt the only alternative which men of honour thought open to him . . . he to the last relied upon an amicable adjustment and went out determined not to fire at deceased and did so at last in a state of nervousness." It is no great wonder that the jury took the very broad hint and followed the example of other juries who, finding "all was fair," refused to convict. The Chief Justice notes that "the jury was but a short time in consultation."

Wilson subsequently married the young lady, who was amiable and accomplished; not the faintest suspicion was

<sup>29</sup> This reminds one of the charge of Chief Justice Fletcher of the Court of Common Pleas of Ireland, when in the second decade of the 19th century, he presided over the trial of one Fenton for the murder of Major Hillas, whom he had killed in a duel: "Gentlemen, it is my business to lay down the law to you, and I will. The law says the killing a man in a duel is murder, and I am bound to tell you it is murder; therefore in the discharge of my duty, I tell you so; but I tell you at the same time, a fairer duel than this, I never heard of in the whole course of my life."

ever breathed against her except the jesting remark of young Lyon made to tease his comrade and not expected or intended to be taken seriously.

Wilson was called to the Bar in 1835 and was at once sent by Boulton to conduct a branch office in Niagara; but in a very short time he removed to London where he obtained a very large practice. After serving in the Rebellion as Captain of Militia he became a Member of the House of Assembly and afterwards in 1863 was elected to the Legislative Council. He did not take his seat in the Council as he was in that year appointed to the Bench of the Court of Common Pleas as a Puisne Justice. He survived until 1869, never it is said ceasing to deplore the unhappy fate of his boyhood's friend Lyon,<sup>30</sup> or his own part in it.

<sup>30</sup> Lyon was of the prominent and well-known family of that name in Eastern Ontario. George Bryon Lyon Fellowes (a nephew) and the Judge Lyon of Ottawa, were relatives.

Robert Lyon was a cousin of the wife of his master, Mr. Thomas Maybee Radenhurst (called and admitted April 21st, 1824), and lies buried in the Radenhurst plot in the old Anglican burying ground, at Perth, Ontario. A headstone placed there by his friends commemorates his fall "in mortal combat."

WILLIAM RENWICK RIDDELL.



# The Canadian Law Times

EDITED BY

A. H. F. LEFROY, K.C., M.A.

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## THE EARLY COURTS OF THE PROVINCE.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D.,  
F.R. HIST. SOC., ETC., JUSTICE OF THE SUPREME  
COURT OF ONTARIO.

## I.

The judicial history of that part of British America which is now our Province lends itself to a division into four periods.

1. Before the King's Bench Act, (1794) 34 Geo. III. c. 2. During all this period the Superior Courts of civil jurisdiction in the province of Upper Canada were the four Courts of Common Pleas, one in each District. From and after 1792, 32 Geo. III. c. 6, there were also Courts of Requests for small debts, which ultimately and long after became our Division Courts.

2. From the establishment in 1794 of the Court of King's Bench till 1837, when by the Act, 7 Wm. IV., c. 2, a Court of Chancery was established. The King's Bench was the only Superior Court: the Courts of Requests were continued and intermediate District Courts (which ultimately became County Courts) were established in 1794 by 34 Geo. III., c. 3.

3. From the erection of the Court of Chancery in 1837 till 1881 when all the Superior Courts, *i.e.*, the Court of Queen's (King's) Bench, the Court of Common Pleas established by (1849) 12 Vic. c. 63 and the Court of Chancery as reorganized by (1849) 12 Vic. c. 4, were combined (with the Court of Appeal) in one Supreme Court of Judicature by the Statute (1881) 44 Vic. c. 5.

4. The period of unification since that Statute. Trifling, and perhaps also important, changes have been made but not such as to affect the principle; the County and Division Courts have been continued: I do not think it necessary to do more than mention the new District Courts, which are in effect temporary inferior Courts in the unorganized parts of Ontario.

In the first period Law and Equity were rather loosely combined: in the second, there was no equitable jurisdiction: in the third, Law and Equity were administered by different



Courts (speaking generally), and in the fourth there is the complete and formal fusion of Law and Equity.

Only the first period is to be dealt with in these papers.

When by the Treaty of Paris, Canada was ceded to Britain in 1763, the number of white settlers in what afterwards became the province of Upper Canada and later the province of Ontario, was very small—and the chief part of that small number was on the south or left bank of the Detroit River. The first official report we have of that settlement<sup>1</sup> shews that in 1752 there were twenty ‘habitants établis sur le côte sud de la rivière.’ These were continually increasing in number till in 1761 we find between three and four hundred of a population. In this year the settlement was detached from the parish of Ste. Anne de Détroit and attached to the parish of the Huron Indians at L’Assomption (Sandwich)<sup>2</sup>. They remained subject to the civil rule of the Governor of Detroit and the whole settlement was considered an appendage of Detroit.

All other settlers in what is now Ontario (if there were any) were close to and considered as belonging to the several military stations and forts.

During the period of French domination, the Commandant at the Fort was the judge and exercised almost unlimited power; and in this territory practically the same rule obtained after the British Conquest for a time.

In 1763, Murray received power<sup>3</sup> as Captain-General and Governor-in-Chief of the province of Quebec to erect Courts of Civil and Criminal jurisdiction within the province of Quebec—this province was formed by Royal Proclamation of October 7th, 1763; it contained all the territory now the provinces of Ontario and Quebec and included also the Detroit country.

Accordingly, September 17th, of the following year<sup>4</sup> Murray established a Court of King’s Bench for the province to

<sup>1</sup> See “Notes Historiques sur la Colonie Canadienne de Détroit,” by Mr. Rameau, Montreal, J. B. Rolland & Fils, 1861, at p. 30.

<sup>2</sup> *Ibid.*, p. 30 *ad fin.*

<sup>3</sup> See his commission, Nov. 21st, 1763, “Constitutional Documents, 1759-1791,” Short & Doughty, Canadian Archives Report, 1905, vol. 3, pp. 126-132; his instructions, *ibid.*, p. 132 *et seq.*, Ont. Archives Report for 1906, pp. 7 *et seq.*

<sup>4</sup> “Ordinances made for the Province of Quebec, etc.,” Quebec, 1767, pp. 6-9. (Where it is, in these papers, stated that a “Governor” made an Ordinance, etc., what is meant is, of course, “Governor-in-Council.”)

sit at Quebec and with jurisdiction in all cases civil and criminal. This Court was presided over by the Chief Justice of the province: and an appeal lay from his decision to the Governor and Council, (including the Chief Justice), in cases of over £300 sterling: where the amount in dispute was £500 sterling or more an appeal lay from the Governor and Council to the King in His Privy Council.

It had been intended that the Chief Justice should sit twice a year in a Court of Assize and General Gaol Delivery at Montreal; but this was found unnecessarily expensive, and the direction was given that this Court should sit only once a year at Montreal, as well as once a year at Three Rivers. In these Courts the trials were by jury.

At the same time<sup>5</sup> a Court of Common Pleas was established with civil jurisdiction only and that only in cases above £10. In cases above £20, an appeal lay to the Court of King's Bench: in cases over £300 to the Governor and Council, with a further appeal to the King in Council in cases of £500 and upwards. This Court had three judges: it sat at Quebec and Montreal and was intended "only for Canadians" i.e., French-Canadians.

The province was divided into two Districts by the Rivers Godfroy and St. Maurice: and Courts of Quarter Sessions<sup>6</sup> were formed for these Districts, to sit at Quebec and Montreal respectively every three months. Three or more Justices sitting in Quarter Sessions could hear and determine actions above £10 currency (\$40) and not exceeding £30 currency (\$120) subject to an appeal to the Court of King's Bench. Any one Justice of the Peace could decide cases in his District not exceeding £5 currency (\$20) and any two Justices, cases not exceeding £10 currency, (\$40), no appeal being allowed in either case. Two Justices of the Peace were to sit weekly in rotation at Quebec and Montreal for these purposes.

The Courts of Quarter Sessions had also their common law jurisdiction in criminal cases.

The jurisdiction of the Courts of King's Bench and Common Pleas extended, of course, over what is now Ontario as did that of the Quarter Sessions and Justices of the Peace of the District of Montreal.

<sup>5</sup> By the same Ordinance, pp. 6, 7.

<sup>6</sup> *Ibid.*, p. 7.

In the Court of King's Bench all cases were to be decided 'agreeable to the Laws of England and to the Ordinances of (the) Province.' In the Court of Common Pleas the judges were 'to determine according to Equity having regard nevertheless to the law of England as far as the circumstances and present situation of things will admit'; but in cases in which the cause of action arose before October 1st, 1764, the French laws and customs were to be followed where the actions were between natives of the province: no express direction is given for the law to be administered by the Justices of Peace in or out of Sessions, but no doubt the same course was expected to be followed by them as in the Court of Common Pleas.

In Criminal cases the existing criminal law of England governed.

The well-known Governor Sir Guy Carleton in 1770<sup>7</sup> abolished the civil jurisdiction of the Justices of the Peace in and out of Sessions: and directed all cases not exceeding £12 currency (\$48) to be tried by the judges of the Courts of Common Pleas. The former Court of Common Pleas had sat both in Quebec and in Montreal: but now there were to be two independent Courts one in Quebec, the other in Montreal, limited in local jurisdiction to their own Districts, open at all times except Sunday and certain vacations. One judge was to sit every Friday to try cases not exceeding £12.

The English civil law never recommended itself to the French-Canadians: the new settlers from the British Isles and English colonies preferred it, and there was much agitation for and against a change. The French-Canadian prevailed; the Act of 1774, 14 Geo. III. c. 83, reintroduced the French civil law, at the same time repealing all the Ordinances, Commissions, etc., of the Governors.

Carleton was instructed<sup>8</sup> to create a Court of King's Bench for the province for criminal cases: and, dividing the province into two districts, to establish a Court of Common Pleas for each District with jurisdiction over all civil cases, 'cognizable by the Court of Common Pleas in Westminster Hall.' The Court of King's Bench was still to be presided over by the Chief Justice: each Court of Common Pleas was

<sup>7</sup> Const. Docs., pp. 280 *seq.*, Ordinance dated February 1st, 1770.

<sup>8</sup> *Ibid.*, pp. 419 *seq.*, dated January, 3rd, 1775.



to have three judges, one Canadian and two from the British Isles or "Our other Plantations."

It was also intended that there should be an Inferior Court of King's Bench for 'each of the Districts of the Illinois, St. Vincenne, Détroit, Missilimakinac and Gaspée' but nothing came of this as the American Revolution intervened. *Inter arma silent leges*. But it was necessary in view of the repeal of all the former Ordinances, etc., to erect some kind of judicial system in the older parts of the British dominions. In 1775 three judges under the name of "Conservators of the Peace" were appointed for each of the Districts of Quebec and Montreal although nothing was done for the outlying regions.

Arnold and Montgomery's invasion coming to nought, Carleton in 1777 made an Ordinance<sup>9</sup> dividing the province into two districts at the River Godfroy and St. Maurice, establishing a Court of Common Pleas in each District, each to sit on one day in each week (excepting 'three weeks at seed-time, a month at harvest, and a fortnight at Christmas and Easter, and excepting during such vacations as shall be appointed by the judges for making their circuits twice every year') to hear cases up to £10 sterling, and on another day to hear those above £10 sterling. Under £10 one judge could sit: for £10 and over, two were required: in the first case unless the matter in controversy related to a duty payable to the Crown, fee of office, annual rent, or such like matter where future rights might be bound, there was no appeal; in the latter an appeal was allowed to the Governor in Council on security being given. A further appeal lay to the King in cases involving £500 or more, on security being given—this appeal lay also in the excepted classes of cases above mentioned. Very elaborate regulations were prescribed for the practice which may be passed over for the present.

In the same year<sup>10</sup> a Court of King's Bench was established with criminal jurisdiction to hold two sessions each year in each of the cities of Montreal and Quebec. A Court

<sup>9</sup> *Ibid.*, pp. 464 seq., dated February 25th, 1777, "Ordinances made and passed . . . Province of Quebec," Quebec, 1777, pp. 1-8 (Osgoode Hall General Library, D 2935). This Ordinance is 17 George III. c. 1.

<sup>10</sup> Const. Doc., pp. 471 seq., dated March 4th, 1777. "Ordinances, etc. (*ut supra*), pp. 39 seq. This is Ordinance 17 George III., c. 5.

of Quarter Sessions to sit four times a year was erected for each district.

Detroit with the adjoining territory on both sides of the river was of course in the Montreal district from the first division of the province; but for some time, this remote region lived an almost independent juridical life. The Governors appointed Justices of the Peace with large powers—indeed one of these Justices, Dejean, in 1776 went so far as to try a man and a woman for arson and larceny with a jury of six English and six French. On a conviction, the man was hanged, it is said, by his fellow convict, who thus saved her own neck. For this both the Governor, Hamilton, and the magistrate were presented by a Montreal Grand Jury: but their offence was forgotten or at least condoned by reason of the troubled state of the country.

For a time a Board of Arbitrators formed by the merchants at Detroit filled the place of a court for the merchants and traders: the habitant had no Court and does not seem to have needed one.

The Treaty of Peace in 1783 brought a very large number of immigrants from the revolted colonies: most of these settled along the international rivers, and their numbers rapidly increased. This new element demanded Courts: in Detroit particularly the arbitration system became unsatisfactory and the great length of time needed to obtain and serve process from the Court at Montreal became a matter of much complaint.

Carleton at length in 1788<sup>11</sup> solved the difficulty by dividing the new country (i.e. Canada, west of what is now the province of Quebec) into four Districts—Luneburg 'to the mouth of the River Gananoque,' Mecklenburg to the River Trent, Nassau 'to the extreme projection of Long Point into the Lake Erie' and Hesse west thereof.

In each of these Districts, there was established a Court of Common Pleas with three judges, with unlimited civil jurisdiction and it is (mainly) of these Courts of Common Pleas it is proposed to speak in these papers.<sup>12</sup>

<sup>11</sup> Const. Doc., p. 651, dated July 24th, 1788: Ont. Arch. Report for 1906, pp. 157, 158.

<sup>12</sup> Mention should perhaps be made of the local and temporary Courts which were established in 1785 for what is now the eastern part of Ontario 'for the ease and convenience of His Majesty's subjects who have settled or may settle in the upper part of this province from and above point Baudet, on the north side of Lake St. Francis to the head of the Bay of Quintiz, on Lake Ontario.'

## II.

The state of affairs when the province of Upper Canada came into existence in 1791<sup>13</sup> was that the province was divided into four Districts, Lunenburg, Mecklenburg, Nassau and Hesse, and in each of these Districts was a Court of

A large number of United Empire Loyalists had settled and more were expected to settle along the River St. Lawrence and Lake Ontario, including the Bay of Quinte (Quintiz), and provision was made by Ordinance, 25 Geo. III., c. 5, for them.

From and after September 1st, 1785, any justice of the peace was empowered to issue one or more writs of summons to call before him any person or persons residing within the district and hear and determine any matter in dispute for the recovery of any debt respecting personal estate where the sum demanded should exceed 2s. 6d. (50 cents) and not exceed 40s. (\$8). Any two justices of the peace might issue writs of summons and try like cases where the sum demanded exceeded 40s. and did not exceed £5 (\$20). The trial Court could issue writs of execution for the debt adjudged and costs of suit, which costs were not to exceed 3s. (60 cents) in the first case or 5s. (\$1) in the second: the debt might be ordered to be paid in instalments, but all within four months. There was no appeal from these Courts.

It will be seen that the territory thus provided for was precisely that which became the Districts of Lunenburg and Mecklenburg—a similar provision was in and by the same Ordinance made for the far east of the province which in 1788 became (in part) the District of Gaspée.

No provision was made for the settlers on the Niagara or the Detroit. I find no record of any litigation in the Court of Common Pleas of Montreal from the Niagara district, though there was considerable from the town of Detroit.

<sup>13</sup>The division of the Province of Quebec into two provinces, i.e., Upper Canada and Lower Canada, was effected by the Royal Prerogative: see 31, Geo. III., c. 31, the celebrated Quebec Act. The message sent to Parliament expressing the Royal intention is to be found copied in the Ont. Arch. Reports for 1906, p. 158. After the passing of the Quebec Act, an Order in Council was passed August 24th, 1791 (Ont. Arch. Rep. 1906, pp. 158 *seq.*), dividing the province of Quebec into two provinces and under the provisions of sec. 48 of the Act directing a Royal warrant to authorize 'the Governor or Lieutenant-Governor of the Province of Quebec or the person administering the government there, to fix and declare such day as they shall judge most advisable for the commencement' of the effect of the legislation in the new provinces, not later than December 31st, 1791. Lord Dorchester (Sir Guy Carleton) was appointed, September 12th, 1791, Captain-General and Governor-in-Chief of both provinces and he received a Royal warrant empowering him to fix a day for the legislation becoming effective in the new provinces (see Ont. Arch. Rep. 1906, p. 168). In the absence of Dorchester, General Alured Clarke, Lieutenant-Governor of the province of Quebec, issued, November 18th, 1791, a proclamation fixing Monday, December 26th, 1791, as the day for the commencement of the said legislature (Ont. Arch. Rep. 1906, pp. 169-171). Accordingly technically and in law, the new province was formed by Order in Council, August 24th, 1791, but there was no change in administration until December 26th, 1791.



Common Pleas of unlimited Civil but no Criminal jurisdiction. In each of the Districts, too, there was a Commission of the Peace, the Justices of the Peace forming the Court of Quarter Sessions—before December 26th also the Court of King's Bench of the province of Quebec had criminal jurisdiction but all the original criminal jurisdiction was exercised by Courts, sitting from time to time under Commissions of Oyer and Terminer—these with Courts of Quarter Sessions were the Courts dealing with criminal matters.

The Courts of Common Pleas were presided over each by three judges, (not skilled lawyers) with the exception of that of the District of Hesse. Many of the inhabitants of this District were Canadians, i.e. French-Canadians.

With that tenderness and regard for the conquered people which almost invariably characterized the British conqueror, Sir Guy Carleton had in his Instructions of January 3rd, 1775,<sup>14</sup> been directed when establishing Courts of Common Pleas in the two existing Districts of the province of Quebec to appoint three judges for each of these Courts 'that is to say, two of our natural born subjects of Great Britain, Ireland or our other Plantations and one Canadian'<sup>15</sup> i.e. French Canadian. Before this time there had been four judges in all for both Districts, three natural born subjects and one a Canadian.<sup>16</sup> The Instructions of 1775 were superseded by those of August 23rd, 1786,<sup>17</sup> which contained no such provision; but the spirit of the former Instructions continued to be carried out. Accordingly where the Districts were created by the Proclamation of 1788 and Courts of Common Pleas came to be formed in and for each, or that one District, Hesse, which contained a considerable number of Canadians, the Court of Common Pleas received one judge a French-Canadian, with two natural born British subjects—

<sup>14</sup> Ont. Arch. Rep. 1906, p. 58 *seq.*, esp. p. 63.

<sup>15</sup> It is worthy of remark as illustrating the consideration paid to the Canadians that in the proposed local Courts of King's Bench intended to be set up in the 'District of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspé,' while the single judge was to be a natural born subject, there was to be associated with him 'one other person being a Canadian by the name of Assistant or Assessor, to give advice to the judge in any matter when it may be necessary.' The districts named were inhabited mainly by French-Canadians.

<sup>16</sup> See Proclamation of April 26th, 1775, Ont. Arch. Rep. 1906, p. 92.

<sup>17</sup> Ont. Arch. Rep. 1906, pp. 135 *seq.*

there were Duperon Baby, Alexander McKee, and William Robertson.<sup>18</sup>

<sup>18</sup> Duperon Baby of an old French-Canadian family: one account is that his ancestor was a merchant of Three Rivers, who visited Detroit in 1703, and a little later established a branch of his family there (*Colonie Canadienne de Détroit*, p. 12). Another and apparently a better account is that Duperon was the son of Raymond Baby, of Montreal, and after serving with credit in the West under the orders of the Commandant of Fort Duquesne, came with his brother Louis after the conquest and settled in Detroit ("*Les Canadiens du Michigan*," p. 185). Duperon Baby was born in 1738 and became a prominent citizen of Detroit, and a trader of great enterprise. At the time of the conquest of Canada by the British, he was at Fort Pitt: he declined to take the oath of allegiance and desired to go back to Detroit, Michilimackinac, and Montreal to recover his debts, and pass to France: Bouquet hesitated to let him go on account of the influence of Baby's family among the Indians. Leave was ultimately given, and Baby went to Detroit. During the Pontiac siege, he encouraged Major Gladwin, and on the final cession of Canada, he seems to have become a loyal British subject—he was appointed Interpreter and Captain in the Indian Department, and was a prominent and trusted official. He took a leading part in society: it is of record that his dancing bills for one winter was over £20. At the time of his appointment as judge, he was the only French-Canadian trader in Detroit, and the chief objections to his appointment (in which he fully shared) were his ignorance of law and his large business connection. He was appointed a member of the Land Board for the district of Hesse and rendered valuable services in interpreting and otherwise. He died at Sandwich in 1789, having in his by no means long life seen Detroit owned by the French, the British and the Americans.

The family does not seem to have been of the noblesse, but it was of the highest respectability, and members of it played some part in the after history of Upper Canada.

Alexander McKee (the name was also frequently written McKay), a native of eastern Pennsylvania, was Deputy Indian Agent at Fort Pitt (Pittsburg) as early as 1772: he was a Justice of the Peace and carried on a large and lucrative business there at the time of the American Revolution. He was, with others, imprisoned by General Hand, of the American forces, in 1777, but released on parole. Threatened with a renewed imprisonment, he made his escape in 1778 with the noted Simon Girty and others and came with them to Detroit. Appointed an Interpreter and Captain in the Indian Department, he took part in practically all the operations of the Loyalist troops in that part of the world. He was present at many meetings with the Indians, over whom he had a very great influence.

He went into business at Detroit and was appointed Deputy Superintendent of Indian Affairs—later in 1794, he became a member of the Land Board of Hesse (at Detroit) and received large grants of land. He died in 1799: his descendants are still prominent members of society in and near Windsor. He was a man of the strongest character and his services were invaluable to the British cause.

William Robertson was a Scotsman and a trader in Detroit in a large way. He was much in the confidence of the authorities—he became a member of the Hesse Land Board, which for a time sat at his house. He left for England in 1790: while absent from the country, he was recommended by Lord Dorchester as one of the Legislative Councillors for the proposed province of Upper Canada. He was so nominated, but never returned to Canada, never was sworn in and never took his seat: he resigned not long after his appointment.

Robertson took the most active part in having the Court for Hesse provided with a lawyer-judge.



All these were laymen; the inhabitants of District, the chief place from which litigation would originate, were largely mercantile and they wanted a lawyer judge. Two of the judges themselves went to Quebec to see the Governor and to have a lawyer appointed—and at length the Commissions to these gentlemen were revoked and William Dummer Powell,<sup>19</sup> a prominent lawyer of Montreal, was appointed the first judge of the Court. An ordinance of May 7th, 1788, 29 George III., c. 3, by section 3 enacted that he should have all the powers and authorities of the whole number of judges until three should be appointed. He presided until the Court was abolished: the sittings of this Court were at L'Assomption (Sandwich).<sup>20</sup>

Three Districts was almost entirely populated by United Empire Loyalist refugees, English-speaking and consequently not requiring a French Canadian judge to protect their interests. Accordingly we find that in none of the other three Courts was there a Canadian appointed.

In the farthest eastward District, Lunenburg, were appointed Richard Duncan, Edward Jessup and John McDonell (Macdonell). Jessup did not serve after September, 1790, and John Munro took his place in December, 1792.<sup>21</sup> Duncan's last appearance as judge was February

<sup>19</sup> William Dummer Powell, born in Boston, Mass., in 1755, was educated there, in England and on the Continent. He took part in the siege of Boston on the Loyalist side, but afterwards went to England and studied in the Middle Temple. He came to Canada in 1779, received a license to practice law, and did practice law in Montreal. Being created first judge of the Court of Common Pleas for the district of Hesse, he went to Detroit in 1789; when the Court of King's Bench in Upper Canada was organized under the statute of 1794, he was made the Senior Puisne Justice. He became the Chief Justice in 1815, and resigned in 1825 on a pension, dying in 1834. Amongst other services of a public nature, he served as a Commissioner to treat with the American invader when Toronto capitulated in 1813. He was also recommended by Dorchester for a Commission as Legislative Councillor of the new province of Upper Canada, but was not appointed. The story of the cabal against him in Detroit is one of the most extraordinary in our (or any) history. It is too long to relate here: sufficient to say, that he was charged with treason, evidence was brought against him in the way of a forged letter, etc., so that he had to go to England to clear himself. Powell was really the first judge in our Court of King's Bench: Osgoode never sat in that Court, but left for Lower Canada before it began operations.

<sup>20</sup> It is sometimes said that the Court of Common Pleas for Hesse sat at Detroit: I have, in an address before the Michigan State Bar Association, in June, 1915, examined the question, and have shown (as I think conclusively) that this is not so—that the Court sat only at L'Assomption (Sandwich).

<sup>21</sup> All these four—Richard Duncan, Edward Jessup, John McDonell, and John Munro—were men of prominence in the settlement. Duncan and Munro were afterwards members of the first Legislative Council. John McDonell (or Macdonell) was possibly the



28th, 1793, after which until its abolition, the Court was presided over by McDonell and Munro. This Court according to extant records sat at Cornwall, Osnabruck, Stormont and New Johnstown.<sup>22</sup>

In the next District, Mecklenburg, the commissions issued to Richard Cartwright, Neil McLean and James Clark, James Clark did not sit after July 8th, 1789, and Hector McLean took his place January 3rd, 1791,<sup>23</sup> and these three, i.e. Messrs. Cartwright and the two McLeans continued to preside over the Court until its abolition—often, however only two of them sat.

This Court sat at Kingston except on one occasion, January 14th and 15th, 1793, when it sat at Adolphustown and tried two cases.<sup>24</sup>

first member in the Legislative Assembly (1792) for the second Riding of Glengarry and the first Speaker of the House. Edward Jessup was born at Albany, was a Loyalist and fought on the loyal side during the Revolutionary wars: came to Canada and settled on land now in part occupied by the Town of Prescott: he became member of the Assembly for the second Parliament, 1796, representing the County of Grenville. In 1800, he became Clerk of the Peace for the District of Johnstown, and died at Prescott, 1815.

<sup>22</sup> New Johnstown was a settlement in the township of Cornwall, upon the River St. Lawrence, below the Long Sault: and was afterwards called Cornwall—the present name. The name New Johnstown still lingered and was for long used occasionally. The township of Osnabruck was above Cornwall, also on the St. Lawrence: it does not appear at what precise part of the township the Courts were held; Judge Pringle thinks probably it was near what is now Dickenson's Landing: Lunenburg or the Old Eastern District, by J. F. Pringle, Cornwall, 1890, p. 47. I see no reason to doubt the accuracy of this identification.

<sup>23</sup> Richard Cartwright was born at Albany in 1759 and educated there: he took the Loyalist side during the Revolution and served two campaigns with Col. Butler, of the Queen's Rangers, as his Secretary. At the close of the war, having in the meantime come to Kingston, Canada, he joined the Honourable Robert Hamilton in business. The partnership dissolving, Hamilton went to Niagara, and Cartwright remained at Kingston. Cartwright was afterwards a member of the first Legislative Council of Upper Canada, and was most attentive to his duties as such. He was the grandfather of Sir Richard Cartwright, of the late Master in Chambers, and the present efficient Deputy Attorney-General.

Niel McLean and Hector McLean were prominent settlers of Scottish descent.

James Clark was afterwards one of the first members of the Law Society of Upper Canada, having been so fortunate as to be one of those receiving a license to practise, under the provisions of the Act of 1794, 34 George III., c. 4. It is said that a Commission as judge was offered to the Reverend John Stuart, but declined by him; and that Richard Cartwright was appointed in his stead: The Story of Old Kingston, by Miss Machar, p. 78.

<sup>24</sup> Kingston had been called Frontenac during the French regime: it rapidly assumed and continued to hold a position of great prominence in the St. Lawrence District.

Adolphustown was for some time of great relative importance, but has long lost its place in the advance of the rest of the province.

In the District of Nassau, there was a curious mistake made. It had been intended to appoint Benjamin Pawling, Colonel John Butler and Robert Hamilton, judges of the Court, but Jesse Pawling's name was inserted in the Commission instead of Benjamin Pawling's—however this was speedily rectified, and on October 22nd, 1788, Jesse Pawling's Commission as judge was revoked (he being appointed a Coroner for the District), and Benjamin Pawling, Peter Tenbrook and Nathaniel Petit were added as judges to the two already appointed, Colonel Butler and Robert Hamilton.<sup>25</sup>

There is no record of the proceedings of this Court extant but no doubt it sat at Newark.<sup>26</sup>

<sup>25</sup> John Butler, the celebrated Coloner Butler of Butler's Rangers, was the son of Lieutenant Butler, a native of Ireland, who came to New York in 1711. The father accumulated a large estate by dealing with the Indians; he died in 1760. The son was born in New London, Connecticut, in 1728, he joined the British forces against France for the Conquest of Canada. He was present at Lake George (1755), Ticonderaga and Fort Frontenac: he also took a distinguished part in the siege of Fort Niagara by Sir William Johnson (1759): his great *forte* was the management of Indian troops—in 1778, he built the Butler's Barracks at Niagara on the Canadian side. He fought on the British side during the Revolution, and at its close came to Niagara, where he survived till 1796, dying after a life of service to the Crown.

Peter Tenbrook (should be Ten Broeck), also a resident of Niagara.

Nathaniel Petit (or Pettit) was recommended by Dorchester for appointment as Legislative Councillor, but failing this, he became member of the first Legislative Assembly for the Riding of Durham, York and first Lincoln; he was also a member of the Nassau Land Board. A farmer, he owned the land on which the Town of Grimsby stands.

Robert Hamilton was of Scottish extraction: a partner of Richard Cartwright on Carleton Island, near Kingston, on the dissolution of the partnership, he came to Niagara; he built at Queenston a large stone residence, a brewery and a warehouse, and was the most important personage commercially in that little community. He became a member of the Land Board for Nassau and also one of the first Legislative Councillors of Upper Canada. He and Cartwright generally saw eye to eye, but did not always agree with Simcoe, who did not hesitate, most unjustly, to call them Republicans.

Benjamin Pawling was a native of Pennsylvania, of Welsh descent, who served seven years in the Butler's Rangers. He had been a farmer, and in the close of the war, settled in Niagara. He was the first representative of the second Riding of Lincoln, in the Legislative Assembly, having then become a Colonel. Jesse Pawling was a brother of Benjamin's.

It is much to be desired that some one of local or family knowledge should write a full account of these pioneers, men of sterling character and loyalty above reproach, who did much to make our Queen Province what it is.

<sup>26</sup> Niagara-on-the-Lake was called Niagara, West Niagara, Loyal-town, Butlersburg, Nassau and Newark at different periods of its history.

WILLIAM RENWICK RIDDELL.

(To be continued.)

# The Canadian Law Times

**EDITED BY**

A. H. F. LEFROY, K.C., M.A. (OXON.)

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# The Canadian Law Times.

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[COMMUNICATED.]

“ Charlie Moss is dead ” ran like wildfire through the Bar a few days ago; and no tongue that uttered it but faltered, no heart that knew it but mourned, for Charles A. Moss was loved as but few in any community are loved. Nor was the love lavished on an unworthy object—his death but fulfilled the promise of his life.

Born in this city in 1875, the son of Sir Charles Moss, but lately the beloved Chief Justice of Ontario, and his mother the daughter of a Justice of the Court of Queen’s Bench, he belonged to the profession of law by heredity and inevitable proclivity. He received his early education at the Model School, Toronto, from which he passed into Upper Canada College. Earning the coveted distinction of Head Boy in that ancient foundation he matriculated at the University of Toronto. A first-class honour man throughout, he received his degree of B.A. from the University in 1894, and at once applied himself to the study of law. After a course at the Osgoode Hall Law School, he was in June, 1897, called to the Bar of the province (with honours) by the Law Society of Upper Canada.

He joined his father’s old firm, now Aylesworth, Moss, Wright, & Thompson, and quickly shewed the hereditary aptitude for his profession which was to be expected, and the thorough knowledge of the prin-



ciples and practice which could come only from careful and accurate study.

Almost from the beginning he found himself charged with matters of intricacy and importance; and he never failed to justify the confidence imposed on him by client and partner.

He took a deep and active interest in everything connected with the Law Society and the profession, and was in 1911 elected a Bencher. The great regard in which he was held by his brethren of the Bar was manifested by the large vote he received on his re-election during the present year. As a Bencher he was faithful to his trust as in all else.

Not a brilliant orator and not given to flights of fancy and rhetoric, he was strong in his presentation of fact and law. Firm in his convictions, tenacious of an opinion formed after careful consideration, he was conciliatory and courteous to his opponents, dignified and respectful towards the Court; respecting himself, he never failed to observe the respect due to others. A Justice of the Supreme Court of the province has more than once been heard to say that Charles Moss was one of the most, if not the most, persuasive counsel at our Bar. His persuasiveness did not depend upon eloquence or vehemence but upon logical arguments, based upon sound premises and clearly expressed. He seldom, if ever, urged untenable points or forgot the real crux of a case in a multitude of irrelevant detail.

Like his father, he remembered that he was a citizen of a free country and that it was therefore a duty to take part in public affairs. The busy lawyer too often finds an excuse in his arduous practice and his duty to his client, to shirk the duty he owes to his country. The long roll of eminent lawyers who have had their part in the public life of this province and Dominion is not closed, and never will be; but there are here and there all over the province barristers whom the people recognize as eminently fitted for

statesmanship who have not yet heard the call of their country.

In his contest for a seat in the Legislature, Mr. Moss displayed the same vigour and frankness which characterized him elsewhere. He made no pretence to a virtue when he had it not; he pressed his cause with the same earnestness he displayed at the Bar, but with the same courtesy and moderation. Defeated, he displayed the same philosophy which he shewed when defeated in Court—"better luck next time." Had he lived he was destined to high rank in the councils of his party and his country.

When educating the mind and storing it with useful knowledge he did not neglect the body. A fine lacrosse player (and these are all too rare) he was one of the best rugby players in Canada, and no contemptible antagonist at tennis, golf or racquets.

Neither work nor play prevented him from being a man among men. He was essentially social and no recluse. Not only the Toronto Golf Club and the Royal Canadian Yacht Club often hailed his presence, but also the Ontario Club, the University Club, and the York Club.

About fifteen years ago he was happily married to Elizabeth, daughter of the Honourable Mr. Justice Britton of the Supreme Court—a congenial companion for a busy and intellectual man.

When Prussia threatened the freedom of the world and threw out the challenge which freemen must needs accept, Mr. Moss did not hesitate. He was one of the first to offer his services as a soldier; he was given a commission in the Royal Grenadiers, but later, that he might do active service, he was transferred to the Third Toronto Battalion; and with it he was for months in the thick of the fighting.

Severely wounded, he was taken to the hospital at Rouen. At first it appeared as though he might recover, but that hope proved vain, and he passed

away October 25th, dying as he had lived, calm and cheerful in doing his duty.

Mr. Justice Riddell in his beautiful tribute from the Bench said of him:—

“ He was a man of distinguished parts, thoroughly versed in his science and profession, an able counsel, a kindly associate and an honourable man. . . . When this terrible war broke out, the real Armageddon of the ages, beside which all other Armageddons are mere childish trifling, he saw his duty immediately. He did not avail himself of the reasons put forward by many. . . . He knew that next to his God his duty was to his country. He, a man of peace and loathing war, cheerfully and without a murmur assumed the King’s uniform.”

The name of Charles Moss will be forever honoured by those who honour duty well done; and will live a tender memory in the hearts of scores of his brethren who loved him well.

Not wealth, but honour,  
Not glory, but duty.



THE "GREEN GOODS GAME"  
IN 1815

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL  
LL.D., F.R.S., Can., &c.

Justice of the Supreme Court of Ontario



## THE "GREEN GOODS GAME" IN 1815.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL,  
LL.D., F.R.S.Can., etc.

Justice of the Supreme Court of Ontario.

Writers on Confidence Frauds—familiarly called "Con."—are wont to attribute the origin of the "Green Goods Game" to the rascals of the United States during the Civil War and shortly thereafter.<sup>1</sup> At that time the circulation of paper money was enormously expanded, and in many parts of the United States specie was for the first time displaced by bank notes and treasury certificates. The unwary were easily led to believe in the facility with which counterfeit bills could be made, the great precautions taken in their production being known to very few. Many were led to buy counterfeit which as they thought could be passed without difficulty or danger. Sometimes these gullible purchasers were got by cunningly worded advertisements, sometimes by "go-betweens," "come-on men",— in the end they paid away their good money for worthless counterfeit—or in the later development of the swindle, for blank paper.

This "fake," which is generally supposed to have begun after the middle of the 19th century is, at least in its earlier form, much older: it is a hardy perennial—for "the thing that hath been, it is that which shall be: and that which is done is that which shall be done; and there is no new thing under the sun."

The purpose of this paper is to tell of a swindle of this character early in the 19th century in Upper Canada, which nearly had fatal consequences.

<sup>1</sup> Major Arthur Griffiths, the Scotland Yard expert, from information obtained from Detective Chief Thomas Byrnes of New York, and from the well-known Lexow enquiry, considers James "King" McNally as the originator—and beyond question "King" McNally was the first large operator at the time. A popular account is given by W. C. Crosby (himself an old "Con" man) and Edward D. Smith in the *Saturday Evening Post* for January 24, 1920.



When "Muddy Little York," now our proud city of Toronto, was taken by the American troops in 1813, one of the terms of capitulation—which by the way was not respected—was that private property should be spared. There was no such provision as to public property and that became the property of the conqueror. William Roe, a clerk in the office of the Receiver-General, took the public funds away and buried them on the farm of John Beverley Robinson east of the Don bridge on the Kingston Road.<sup>2</sup>

When General Dearborn asked for the funds, he was informed that a clerk had taken them away without authority;<sup>3</sup> he insisted that they should be replaced and threatened to give the town up to fire and pillage if they were not forthcoming. The threat was effective: the funds were produced—but the American troops burned the public buildings, the library, etc., robbed the church of its plate and committed numberless acts of private robbery.

The public funds amounted to about £2,000, partly in what were known as Army Bills. Army Bills were quite as well known in Upper Canada during the War of 1812 as greenbacks in the United States during the Civil War.

Without going into minutiae, it is sufficient to say that these Army Bills were equivalent to promises to pay money out of the Army chest. Sometimes the paymaster was far distant, sometimes if at hand, he had no specie—accordingly while Army Bills might be worth their face value where the paymaster was and when he had ample specie, they were naturally at a discount at other times and places. The Province of Upper Canada, recognizing the necessity of stabilizing these bills

<sup>2</sup> Roe was the son of Walter Roe, of Detroit, one of the two lawyers in Upper Canada when it came into existence as a Province in 1791-2. See my "Legal Profession in Upper Canada," pp. 165, 599.

<sup>3</sup> When William Dummer Powell was told of this excuse he became angry and demanded, "Why was General Dearborn not told that there were no public funds?" I would have hesitated to say this but for the fact that it is set out in a paper in Powell's own handwriting in the Canadian Archives—he was a Justice of the King's Bench and afterwards Chief Justice.

as much as possible, passed an Act<sup>4</sup> which provided that Army Bills should be taken at par by Collectors of Revenue and Custom, as well as by the Receiver-General;<sup>5</sup> the deposit of the amount of a fi. fa. or a ca. sa. in Army Bills operated as a supersedeas of the writ—if the plaintiff accepted the Army Bills as payment well and good, if not, his writ was stayed and he got no interest. So, too, if a person were arrested on mesne process and held to special bail, he could deposit the amount in Army Bills. The Legislature stopped just short of making Army Bills legal tender: but the legislation was effective in raising and steadying the value of the Bills.

The amount of Army Bills taken at York was considerable, but by no means up to the boastful stories told by the conquerors.<sup>6</sup> At all places in Upper Canada near to the American border, the story was circulated of the enormous amount of Army Bills taken by the American forces: and it was represented that the soldiery had obtained many by private pillage.

Now was the chance for the "Con"-man—the name is comparatively modern, the practice as old as civilization. A regular factory for forging British Army Bills was instituted at Ogdensburg; and unwary Canadians were induced to buy the "faked" article at a much reduced price. The Parliament of Upper Canada had in 1813 made the forging of Army Bills or the uttering of forged Army Bills, knowing them to have been forged, a felony without benefit of clergy;<sup>7</sup> this

<sup>4</sup> (1813) 53 Geo. III., c. 1 (U.C.)—of course the enormous quantities of material, food, etc., needed for the troops were paid for in Army Bills; and vast quantities of them were in circulation. The Act was only temporary, but it was extended by (1814) 54 Geo. III., c. 16 (U.C.), and not repealed until (1816) 56 Geo. III., c. 26 (U.C.), after the war.

<sup>5</sup> It was more than hinted at the time that collectors and receivers and even the Receiver-General bought Army Bills at a discount and turned them in at par.

<sup>6</sup> Probably not one American out of a hundred thousand knows of the burning by American troops of our public buildings, of Fort George, etc., or knows that the Capitol at Washington was burned in retaliation for these barbarous acts—expressly so stated at the time by the British Admiral.

<sup>7</sup> A person convicted of a felony "without benefit of clergy," was hanged on conviction; in any other case of felony, he was let off the first time but hanged if again convicted. By the law at that time, as now, "every dog was entitled to one worry:" the law then gave every man one crime—now the good old times are gone. Benefit of clergy was abolished in Upper Canada by the Act (1833) 3 Will. IV., c. 3, sec. 25 (U.C.)—in England by sec. 6 of the Criminal Law Act of 1827.

rather damped the sale of the "green goods," but did not wholly prevent it.

In the Fall of 1813 one Reuben Ainsworth was arrested at Cornwall for uttering a forged Army Bill to Mr. McAulay of that place; he was committed to gaol at Cornwall to await the Court of Oyer and Terminer and General Gaol Delivery, and the (Acting) Attorney-General, John Beverley Robinson, was notified. In those days the Attorney-General and Solicitor-General were accustomed to prosecute the criminal cases in person, unless it was physically impossible—the fees which they thus earned, small as they were, helped to eke out the disgracefully small salaries they were paid.<sup>8</sup> But Robinson was overburdened with official work (it is amazing how he stood it), and recommended Mr. Jonas Jones<sup>9</sup> of Brockville to be retained to prosecute Ainsworth. Ainsworth saved his neck by breaking gaol<sup>10</sup> and effecting his escape to the United States. Jones, however, went into the matter very fully; he found that these forged Bills were for sale at Ogdensburg, and that evil-disposed persons on the Canada side crossed over and purchased them to circulate them in this Province; he obtained names and took means to effect the arrest of the offenders—the evil was spreading alarmingly in the Johnstown and Eastern District, *i.e.*, along the St. Lawrence.<sup>11</sup>

It was not long before a young man was caught passing a forged Army Bill. Duncan Campbell, one of

<sup>8</sup> These law officers were paid and appointed by the Home Administration. John Sandfield Macdonald was the last "Law Officer of the Crown" to prosecute in person—I never saw it done.

<sup>9</sup> Afterwards (1837) Justice of the Court of King's Bench, Upper Canada. Robinson's letter is in the Can. Arch. Sundries U.C. 1813, and is dated at York, October 31, 1813. Robinson says Jones is of Elizabethtown: de Rottenburg says he is a lawyer of Prescott, he himself addresses his letter from Brockville.

<sup>10</sup> Neil McLean, the sheriff, writing from Charlottenburg November 19, 1813, with the information of the landing of the troops of General Wilkinson in the Township of Matilda, says that the Gaol became unsafe and he ordered a guard to take the prisoners to Coteau du Lac to Colonel Scott—Reuben Ainsworth and Richard Boyer, committed for crime, Alexander Hover (a debtor), and John Fulton, both dangerous and disaffected persons. "Ainsworth jumped out of the window guarded by two men the day before they were to leave—the others were delivered to Col. Scott." Canadian Archives Sundries, U.C., 1813.

<sup>11</sup> See letters of Jones to Edward McMahon, the Governor's Secretary, Brockville, Nov. 13, 1813: from General de Rottenburg to Col. Edward B. Brenton, Kingston, Nov. 16, 1813. Can. Arch. Sundries, U.C.



a most respectable family, his father an old army officer, and himself with hosts of friends, in Elizabethtown passed off on a shopkeeper, Mr. Jones, a Bill which was soon found to be forged. He claimed to have received it as genuine, and as one of the Army Bills taken by the American army at York; he had received it at Ogdensburg and claimed that it was genuine.

He was placed on trial at Brockville at the Fall Assizes, 1814, before Mr. Justice Campbell. The trial judged charged the jury that to convict they must find that the prisoner when he uttered the forged Bill knew it to be forged. The jury convicted and Campbell was sentenced to death. The judge respited the sentence to allow of a petition for clemency, but refused to recommend commutation. The jury and the Grand Jury both petitioned on his behalf, and petitions of many pages running into the hundreds of names poured in; the prisoner also petitioned, vehemently asserting his innocence—it seems quite clear that neither the convict nor the jury knew that the offence was capital, for the statute was not printed or published in the District till months after his arrest.

The Attorney-General, John Beverley Robinson, being asked by the Lieutenant-Governor for his opinion, said that he was certain that the young man had not known that the crime was capital, and recommended that as it was a first offence, and the prisoner came of a loyal and respectable people, he should be pardoned. Campbell did not wait for the pardon; he apparently did not know that a pardon was in prospect—he broke gaol<sup>12</sup> and left his country for his country's good.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, February 7, 1920.

<sup>12</sup> It is impossible not to suspect connivance at this escape; the whole district petitioned for Campbell's pardon, horrified at the death penalty for such an act—but gaol-breaking was notoriously common at that time, it is not unknown even now. All the facts of this case are to be found in the Canadian Archives at Ottawa in documents which I have read and copied.



# HOW THE KING'S BENCH CAME TO TORONTO

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL  
LL.D., F.R.S., Can., &c.

Justice of the Supreme Court of Canada *Ontario*





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Justice of the Supreme Court of ~~Canada~~ *Ontario*

In 1794 the first Legislature of the Province of Upper Canada in its third Session, abolished the four Courts of Common Pleas, which had been established by Lord Dorchester in 1788 with full civil jurisdiction — one for each of the four Districts, Lunenburg, Mecklenburg, Nassau and Hesse, into which he divided the territory afterwards to become Upper Canada, but in 1788 still part of the enormous Province of Quebec, created by the Quebec Act of 1774, 14 George III, c. 83.

While the Canada (or Constitutional) Act of 1791, 31 George III, c. 31, provided for the government of the two Provinces, Upper Canada and Lower Canada, into which the Province of Quebec was provided, it did not interfere with the existing Courts which continued in full vigour.<sup>1</sup>

The French Canadian law in civil cases, which had been in force from and after the Quebec Act of 1774, was replaced in the Province of Upper Canada in 1792 by the first Act of the First Parliament, 32 George III, c. 1 (U.C.).<sup>2</sup> All questions of fact, damages, etc., were directed to be tried by a jury by the second Act, (1792), 32 George III. c. 2 (U.C.), and in 1794 the judicial system of the Province was brought into line with the system in England.

The Judicature Act (or King's Bench Act) of 1794, 34 George III, c. 2 (U.C.), established a Court of King's Bench for the Province "with all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction." This was the original Superior Court of Common Law

<sup>1</sup> The proceedings in these Courts so far as extant were published by the Ontario Archives last year.

<sup>2</sup> The criminal law of England which had been introduced into conquered Canada by the Royal Proclamation of October 7, 1763, was not interfered with by either the Quebec Act or the Canada Act.

with Provincial jurisdiction—and it has been in substance continued in various forms until now it is merged in the present Supreme Court of Ontario.

The Court of King's Bench was to be "holden in a place certain,<sup>3</sup> that is in the city, town or place where the Governor or Lieutenant-Governor shall usually reside, and until such place be fixed, the said Court shall be holden at the last place of meeting of the Legislative Council and Assembly."

When Upper Canada began her Provincial life, the Definitive Treaty of 1783 between the Mother Country and her revolted colonies, now become the United States of America, had fixed the dividing line between their territories at the middle line of the Great Lakes and connecting rivers: but the United States had agreed that there should be no legal obstruction to the recovery by British creditors of their claims against American debtors in full. Certain of the States had passed legislation which prevented this being done and refused to repeal it; the United States could not carry out their<sup>4</sup> agreement, and Britain kept possession of the lake and river forts—Michillimackinac, Detroit, Buffalo, Niagara (east of the River Niagara), Oswegatchie, &c., &c. Simcoe, the first Lieutenant-Governor of Upper Canada, selected as his temporary residence and as the temporary Capital of the Province, the little hamlet West Niagara, Nassau, Butlersbury—it had all these names and more—he renamed it Newark, from Newark in New Jersey, with which he had been acquainted during the Revolutionary War, and called the Legislature together at that place, now the beautiful and interesting town of Niagara-on-the-Lake. That being the "place of meeting of the Legislative Council and Assembly," the Court of King's Bench must sit there. Osgoode, our first Chief Justice, never sat in

<sup>3</sup> Everyone will remember the provision of Magna Carta, Cap. XVII. —"*Communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*"—the provision as to the place of holding the Court of King's Bench in Upper Canada is in sec. 1 of the Act, *ad fin.*

<sup>4</sup> The "United States of America" could not at that time be spoken of as an entity in the singular; it is only of comparatively recent years that the United States can be spoken of as "it"—I think the present President was the first to use the pronoun "she" of his country.



the Court of King's Bench; he left for Lower Canada immediately after the passing of the Act and became Chief Justice of that Province.

The Court of King's Bench was to consist of the Chief Justice of the Province and two puisne justices. William Dummer Powell (afterwards Chief Justice of the Province), who was the first and only Judge of the Court of Common Pleas for the District of Hesse, with his residence at Detroit, and the place of sitting of his Court at L'Assomption (now Sandwich), was appointed a Puisne Justice and came to Newark. No other puisne justice was appointed for four years, and a new Chief Justice did not arrive till 1796; but there was at Newark an officer of the Crown willing and ready to take any office so long as there was money in it, and quite irrespective of any qualifications on his part. The Honourable Peter Russell, the Receiver-General,<sup>5</sup> who was so ignorant of law that he expressed his wonder at there being an even number on the jury, received from time to time a temporary commission to sit as a puisne justice and until January, 1797, Powell, sometimes alone and sometimes with Russell, held Court at Newark.

But from the first it was understood that the territory to the right of the middle line of the Lakes and Rivers would be given up to the United States; and Simcoe set himself to determine a permanent capital. He fixed a site at the Forks of the La Tranche River—the River was renamed the Thames, and the site of the proposed capital, London—Simcoe rather expected that the Province would ultimately be divided and London be the Capital of the Western part. He was led to select this place from its distance from the American border—the citizens of the new Republic were truculent, and there was always a real danger of their invading the British Province, a danger which became actual in 1812.

<sup>5</sup> The current gibe ran that Russell was called Receiver-General because he was generally receiving; all the contemporary correspondence, etc., indicate that if he was not receiving at any time, it was because there was nothing to receive.

Simcoe recognized that a naval station was necessary and he selected Toronto, which he renamed York in honour of the Duke of York, then showing some military talent in the Low Countries.

In 1794, Washington sent John Jay, the Chief Justice of the United States, to London to arrange the differences now becoming somewhat acute between the two countries; and late in that year a Treaty was negotiated whereby (*inter alia*) the United States were to pay the claims of the British creditors,<sup>6</sup> and Britain was to give up the retained territory and posts by August, 1796.

It therefore became necessary to remove the Capital of the Province: so long as Newark was protected by British guns in the Fort across the River it was safe, but the case was quite different when the guns became American.

London could not be adopted for the Capital at the time: there were no roads, no way of getting to and out of it except through the primeval forest. In those days, water communication was practically the only means of access in summer and the lakes were the real King's highway.

Simcoe with the consent of the Home authorities, and early in 1796, selected York as the Capital for the time being,<sup>7</sup> and directed the removal of the officers of the Crown to that place with convenient speed. He left the Province for England on leave of absence in July, 1796, and Peter Russell became Administrator of the Government. Before Simcoe left the Province he dissolved Parliament and issued writs for a General Election—much to the discontent of Russell, who was thereby deprived of the fees which were paid at that time to His Majesty's Representative for such services—for Russell "needed the money." Simcoe left instructions that the new Parliament should be called together at York—this of course would necessitate the

<sup>6</sup> Ultimately arranged at £600,000.

<sup>7</sup> It is a mistake to suppose as some have done that Simcoe intended York to be the permanent Capital; he never abandoned his idea that London should have that honour. This is made abundantly manifest by the correspondence in the Canadian Archives.

removal of the Court of King's Bench to that place at the Term following the Session. John Elmsley, the second Chief Justice, arrived at Newark in November, 1796. Without ever seeing York or knowing anything of it except what he was told by the Newark people, he took a most implacable prejudice against it, and declared openly that he would never build a residence there; Elmsley is described<sup>8</sup> as "a man of conciliating manners when he pleases and of an agreeable eloquence and much acquired information, but unfortunately too impetuous and apt to be hurried on by every first impulse, which often leads him into expressions and acts that on cooler reflection he repents of."

His objections to York were, however, well founded—Russell says,<sup>9</sup> "At present York is in a manner isolated, being cut off by the want of roads from an easy land communication with the rest of the Province. It has no jail, no houses for the meeting of the Legislature,<sup>10</sup> none for the Courts of justice, nor even offices for the Departments. Our dependence rested solely on the Queen's Rangers for assistance to raise these necessary buildings, make bridges, cut roads of communication, &c. The detachments taken from thence by Lord Dorchester's orders reduced this assistance to 100 men, and Major Shank finding himself incapable of transporting the Indian stores, now calls for 30 more."

La Rochefoucault, who visited Upper Canada in 1795, says that York had only about twelve houses, and "the inhabitants, they say, have not the best character in the world"—"les habitans n'y sont pas, dit-on, de la meilleure espèce:"<sup>11</sup> but he never visited York and

<sup>8</sup> By Russell in a letter to Simcoe from Niagara, September 13, 1797, Wolford Manor Papers, Book 8, p. 395; this estimate of him is confirmed by Powell in some of his MSS.—and by the conduct of Elmsley himself—Russell alone could not be considered sufficient authority; he was far from unprejudiced.

<sup>9</sup> In a letter to Prescott from Niagara, August 29, 1796, Wolcott Manor Papers, Vol. 8, p. 332.

<sup>10</sup> Simcoe had given directions for erecting Parliament Buildings but the work was far from completion; these were the buildings destroyed by the Americans in 1813.

<sup>11</sup> See my Edition of La Rochefoucault's Travels published by the Ontario Archives, 1917, pp. 61, 159.



his "dit-on" came from Newarkers and therefore must be taken *cum grano salis*.

Several of the officials—the Chief Justice being the leader—privately urged Russell to retain Newark as the Capital and call the Legislature to meet there: he was loyal to Simcoe and moreover was building a residence for himself at York and he stood firm. The unfinished house was burned, January 25, and the Chief Justice renewed his request: Russell was not so firm and wrote<sup>12</sup> at full length to the Duke of Portland, the Secretary of State for War and the Colonies, setting out the isolation of York from bad roads, and that he despaired of finding accommodation for the members of the two Houses, that juries would be difficult to get, &c., &c.—he added that he would defer coming to a formal decision in hopes that he might receive some command in the matter by the Winter express, or at least before he should issue a Proclamation for the meeting of Parliament.

The Chief Justice then sent a formal communication<sup>13</sup> to Russell, which reads as follows:—

#### "CONDITION OF YORK.

Newark, February 22nd, 1797.

SIR,—It is not without some degree of pain that I feel myself called upon by the duty of my station in this Province to request Your Honour's attention to a matter of the utmost importance to the Administration of Justice in it.

Your Honour knows that by Stat. 34 Geo. 3 c. 2, the Court of King's Bench, and the sittings for the Home District are until the Seat of Government is fixed, to be held at the place, where the Legislature was last assembled. On my arrival here in November last, I was informed that no place had yet been definitively fixed upon as the future Capital of the Province; but that in the meantime, the Courts of Justice and the different offices of the Government were to be removed from this place to the Town of York, and that His Excellency, General Simcoe, had left instructions with your Honour to convene the Legislature there. What the object of this measure, so far as the Courts of Justice are concerned is, I have never heard: but be it what it may, it is my duty to request of your Honour, that the execution of it may be

<sup>12</sup> From "West Niagara," February 1, 1797. Canadian Archives, Q. 283, p. 99.

<sup>13</sup> Canadian Archives, Q. 283, p. 117. See also Wolford Manor Papers, Vol. 8, p. 372.

suspended, at least until His Majesty's pleasure is known on the subject.

The Town of York is as your Honour knows near forty miles beyond the most remote of the settlements at the head of the lake, and the road to it lies through a tract of country in the possession of the Missasagues. Besides this there is at York neither gaol nor court house, no accommodation whatever for Grand or Petty Jury, none for the suitors, the witnesses or the Bar, and I believe, but very indifferent for the Judges, so that the greater part of those whom business or duty may call to York, must remain, during their stay there, either in the open air, or crowded together in huts or tents, in a manner equally offensive to their feelings and injurious to their health. When to these circumstances your Honour adds that some of the Petty Jury (to say nothing of Grand Jurors), may be called from the distance of sixty or even eighty miles, and cannot be supposed to be absent from their own homes for less than ten days, you will immediately perceive that there is no fine which it would be prudent, or indeed, in the present circumstances of the Province just to impose as the penalty of absence, which a man, who might otherwise want no inclination to discharge a public duty, will set in the scale against the fatigue, the expense, the loss of time, and the personal inconvenience of attendance. So strongly am I persuaded that this will be the case, if the sittings are removed to York, that I do not expect to be able to form a jury there; and unless I have been much misinformed, any interruption in the course of justice as at present by law established, will from causes which I need not bring to your Honour's recollection, be of the most pernicious tendency—there being now several causes in Court, which ought to have been tried last summer, but which if the Courts are removed to York, will probably remain untried for another year, and for anything I can foresee for several years to come.

To point out to the Executive Government of the Province, the effects which the measure in question may by possibility have on the administration of justice, I conceive to be the more immediate duty of the station I have the honour to fill in it. I am, therefore, most respectfully, but most earnestly to request, that unless your Honour has His Majesty's express commands on the subject or unless there are considerations of greater weight in favour of the measure than those I have suggested against it, your Honour will be pleased to call the next meeting of the Legislature at this place, which will, of course, keep the Courts here also. Should either of these reasons make it impossible for your Honour to alter your present intention, I shall feel it a necessary, though painful duty, to request that I may be permitted to bring in a Bill as early as possible in the session for the purpose of continuing the Courts at this place, until a situation as easy of access and as convenient is provided for them elsewhere. I have the honour to be with greatest respect.

Your Honour's most obedient servant.

(Signed.) JOHN ELMSLEY, C.J."

Russell at once communicated <sup>14</sup> with Portland, taking occasion to express his opinion that York was "the most eligible situation on the Lake for the seat of Government, as being a port of commodious access from all parts of it, out of reach of immediate insult and capable of defence from any hostile attempt by land or water, being also sufficiently central for a land communication with each extreme of the Province."

No answer could be expected for many months, and it was impossible to leave the matter open—the Chief Justice insisted that the question should be brought before the Executive Council. Russell laid it before the Council, and to the dismay of the Chief Justice every member but himself voted for York.

Parliament was accordingly called for York and sat there June 1, 1797. The Chief Justice had bought the house of Colonel Robert Pilkington at Newark, which had been occupied by John White, the first Attorney-General, and spent a large sum—said to be £1,500—in improvements and was determined not to move. When he found that Russell could not be influenced to keep the capital at Newark, he asked leave to bring in a Bill in the Legislative Council (of which he was Speaker) to retain the Court at Newark for two years. This was refused, but Russell allowed him to bring in a Bill enabling the Administrator to retain the Court there for a period of not more than two years—the Executive Council agreed that such a Bill might be introduced in Parliament. Instead of this Bill Elmsley had a Bill introduced and passed empowering the Administrator to retain the Court at Newark for two years, and also to fix the Assizes for the Home District there for the same time. Russell did not know of this until called upon to give the Royal assent to the Bill; he refused on the advice of the Executive Council and perhaps the Attorney-General.<sup>15</sup>

Elmsley never forgave Russell: thereafter as Russell complains, "he has endeavoured to thwart me on

<sup>14</sup> Letter from Russell to Portland from West Niagara, February 26, 1797, Canadian Archives, Q. 283, p. 112.

<sup>15</sup> Russell leaves this doubtful in his letter to Simcoe from Niagara. September 13, 1797, Wolford Manor Papers, Vol. 8, p. 395.



many occasions, and frequently forgets the respect he owes to my present station.”<sup>16</sup>

But he knew a more certain form of revenge: Russell after he became Administrator continued the practice followed by Simcoe, and gave himself a Commission to sit as puisne Justice of the Court of King's Bench with the accruing profits of £500 sterling per annum. Elmsley on his arrival in the autumn of 1796 being spoken to by Russell as to this, had no objection, “but would on the contrary be pleased with it, and my friends here advise me to solicit the situation as the only probable means I may have of procuring an income upon which I can possibly live in this dear country.”<sup>17</sup> But while Russell sat without objection through Easter Term, April, 1797, when Trinity Term came and the Court sat at York July 1797, the Chief Justice demanded to know by what right he gave himself a Commission. While Russell sat during most of this Term with Elmsley, the Chief Justice was so offensive that Russell did not sit for the last two days of Term—and he never ventured to give himself a Commission thereafter. Russell complained to Portland, and was told that he was now receiving a sufficient salary and he should not try to sit as a Judge being also the Executive.<sup>18</sup>

Elmsley's hopes of a return of the Capital to Newark were dashed by the receipt by Russell of a despatch from Portland that “the selection of York for the capital was made upon the most mature reflection.”<sup>19</sup> And the Court remained at York as well. It may be mentioned that when Osgoode Hall was built and it was arranged (1831) that the Court should sit there, the Hall was not in the Town of York, which came only north to Lot (now Queen) Street, but was in the Township of York: it was necessary to obtain

<sup>16</sup> See letter mentioned in note 14.

<sup>17</sup> See letter Russell to Simcoe, Niagara, December 31, 1796, Woford Manor Papers, Vol. 8, p. 358.

<sup>18</sup> The last previous time at which the Head of State attempted to sit as a Judge was probably in the times of James I.

<sup>19</sup> Canadian Archives, Q. 283, p. 132, letter from Portland to Russell, Whitehall, September 11, 1797.

legislation to enable the Court to sit out of the Town of York, and the Act (1831) 2 Wm. IV, c. 8 (U.C.), was passed for that purpose.

WILLIAM RENWICK RIDDELL.

AUTHOR'S NOTE:—Some of the many disadvantages of the new capital may be learned from an official letter from the Administrator, Peter Russell, to Simcoe, then living in England. Writing from York, Upper Canada, December 9, 1797, he says:—

“I have the pleasure to inform your Excellency that I arrived here on the 30th ult., with my family and all my effects, which were with great difficulty and some damage got on shore, as a violent storm of wind, rain and snow came on immediately after, and has continued almost ever since with very little intermission, accompanied by a most intense frost; so that our harbour is now completely blocked up for the winter, and I am not without apprehensions that the inhabitants of this settlement may suffer for want of flour, as their expected supplies of that article have been cut off by this early visit of hard weather. Boards and scantling are likewise very scarce here, and not to be procured now from the mills. I am in consequence wholly uninclosed, and without covering for my horses, oxen or poultry, and what is still worse, my friend, Mr. McGill, has, very unlike a friend, neglected to lay in hay for me although he was early requested to do so, and I cannot procure a sufficiency for their support at any price. The Attorney-General [John White], and Mr. Smith [Acting Surveyor-General], have by very great exertions got themselves housed, the latter pretty comfortably. But Mr. Jarvis [Provincial Secretary], not having made the smallest effort for the removal of his office, remains still at Niagara, and most probably means to do so until your Excellency's arrival. The two wings to the Government House are raised with brick and completely covered in. The south one being in the greatest forwardness I have directed to be fitted up for a temporary Court House for the King's Bench in the ensuing term [the Court sat there till the buildings were burnt by the Americans in 1813], and I hope they may both be in a condition to receive the two houses of Parliament in June next. I have not given directions for proceeding with the remainder of your Excellency's plan for the Government House, being alarmed at the magnitude of the expense which Captain Graham estimates at £10,000. I shall, however, order a large kiln of bricks to be prepared in the spring and burnt (as they will readily sell for what they cost, if the Government does not want them), and boards and scantling may be cut and seasoned upon the same principle. But I sincerely hope to have the pleasure of seeing your Excellency here before we shall have occasion to proceed further with the building.

I have extended this town [at that time near the mouth of the Don], westward towards the garrison, and to the north as far as

the base [Lot Street now Queen Street], of the hundred acre lots reserving between the part that was laid out by your Excellency, and this addition, a large space for public buildings (viz., a church, Court House, jail, market, hospital, school house, etc); most of the lots have been already taken up and about forty houses erected and several more are beginning.

The huts at the garrison requiring considerable repair to render them habitable in winter, I have caused the Block House (which your Excellency originally intended to place on the peninsula) [the present Island was made by a storm in the 50's breaking through the neck of the peninsula at what we now call the 'Eastern Gap'], to be raised on the knoll on this side the Garrison Creek, and fitted as a barrack for 70 men. On the top of it is put a light house, which renders it a convenient and conspicuous object to guide vessels into the harbour. Upon the whole I flatter myself your Excellency will not be displeased with what I have done at this place.

I have been very chaste in my selection of inhabitants for the Long Point settlement [on Lake Erie], and I am happy to inform your Excellency that in the late alarm of invasion no less than 160 young men turned out volunteers from it. As the militia wanted organization I appointed Captain Rierse [Samuel Ryerse, afterwards Lieutenant-Colonel of Militia], (being of most respectability), to be Lieutenant for the County of Norfolk, and he has shown great zeal in the duties of his station.

The British merchants at Detroit [the British evacuated Detroit, August, 1796], having solicited me to give them a town on that river, where they may reside and carry on their trade with equal convenience, I purchased from the Indians the gore near the Huron Church for their accommodation, and named it Sandwich, and I am informed that several houses have been already built there, and that it promises fair to become soon the most beautiful town in the province.

I am sorry to observe to your Excellency that we are miserably off for churches and clergymen. Mr. Raddish, who came out with the Chief Justice [Elmsley] very strongly recommended by the Duke of Portland, was named by me at his own desire for this place. He has since returned with my leave to Europe, and I very much hope he may come back to us as he is an excellent preacher and an agreeable man. I have recommended to the Bishop that of the £1,000 voted for building churches in this province half may be appropriated to York and £200 each to New Johnston [by Cornwall] and Sandwich, and the remainder to Newark [Niagara-on-the-Lake]. But His Lordship has not yet favoured me with an answer.

In a letter I have lately received from Mr. Osgoode [who had gone to Lower Canada in 1794 as Chief Justice], he advises me to solicit the Lieutenant-Governor of this province in case your Excellency should not incline to return to it. But though I very much want the income to enable me to live in this country, and would be very happy to get rid of the great charge and responsibility of the Receiver-General's office, I yet fear to make a



request of that nature without more powerful support than I can now expect, after the loss of almost all my friends. Should His Grace the Duke of Portland think me, however, worthy of that high honour, I should accept it with gratitude and do my best not to disgrace the appointment.

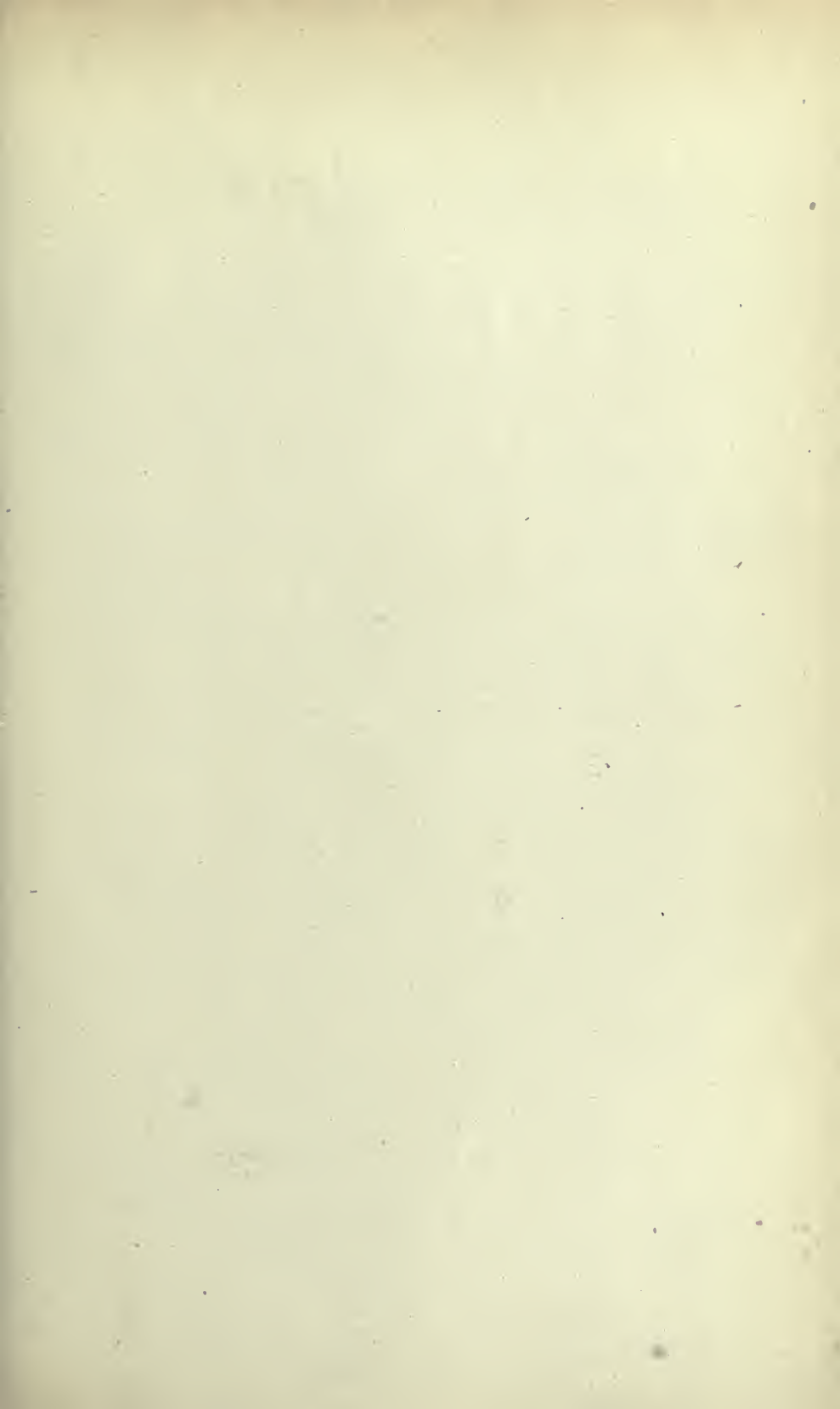
I have much more to say to your Excellency, but as I can have no certainty that this letter will ever reach you (having no means of sending it. but by the common post through the States to New York), I shall defer it until the winter express. In the meantime should it fortunately reach your hands, I beg you will do Miss Russell [who survived him and got all his property] and me the honour of presenting our respects and best wishes to Mrs. Simcoe and accepting the most sincere regards of, dear sir,

Your Excellency's most faithful and obliged servant,

PETER RUSSELL.

His Excellency General Simcoe, etc., etc., etc.

[Wolford Manor Papers, Book 8, p. 410.]







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*Chicago, Illinois.*

KENNETH F. BURGESS



## JUDGES IN THE EXECUTIVE COUNCIL OF UPPER CANADA

WHEN in December, 1791, Upper Canada began her separate provincial career, her first Lieutenant-Governor, Colonel John Graves Simcoe, said that the Constitution of the Province was "the very image and transcript of that of Great Britain."<sup>1</sup>

This, theoretically, was true; the Canada or Constitutional Act of 1791<sup>2</sup> provided for a Governor corresponding to the King, a nominated Legislative Council with life tenure corresponding to the House of Lords, and an elected Legislative Assembly corresponding to the House of Commons. In legislation the parallel was fairly complete,<sup>3</sup> but in administration there was a very great difference.

In England the "Cabinet" system had been established shortly after the Revolution of 1688—the advisers of His Majesty, the ministry, the administrative officers, were responsible to the House of Commons and must retain the confidence of that House; they were one body and must stand or fall together. Nothing of the kind was provided for Upper Canada.

In the old Province of Quebec<sup>4</sup> the Governor had had an Executive Council selected for him, generally at his own instance; the

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<sup>1</sup> See speech from the throne on proroguing the first Parliament of Upper Canada, October 15, 1792, 7 Ont. Archives Report (1910), p. 11; 6 do., do. (1909), p. 18. Upper Canada then *de jure* extended only to the middle line of the Great Lakes and connecting rivers, but *de facto* it took in Detroit and Michilimackinac and their "dependencies" until given up in 1796 under Jay's Treaty.

<sup>2</sup> (1791) 31 George III, c. 31 (Imp.), Shortt & Doughty's Constitutional Documents, 1759-1792, 2nd Edit., Ottawa, 1918, pp. 1031-1052.

<sup>3</sup> The Lieutenant-Governor, indeed, sometimes reserved bills (passed by both Houses of Parliament) for the royal pleasure; and some of these were disapproved, nominally by the King, but in fact by the imperial administration, whereas there had been no royal disapproval of a bill passed by the Imperial Parliament from the times of William III.

<sup>4</sup> Formed originally by the Royal Proclamation of October 7, 1763, Shortt & Doughty's Constitutional Documents, 1759-1792, pp. 163-168, largely increased in size by the Quebec Act (1774), 14 George III, c. 83 (Imp.); do., do., pp. 570-576.

Canada Act (Sec. 50) contemplated a like council in the new Province, an Executive Council to "be appointed by His Majesty for the affairs of such Province."

The members of this Council were in no way responsible to the people, either directly or through their representatives in the House of Assembly; they were responsible only to the King as represented by the Lieutenant-Governor, just as the "Secretaries" at Washington are responsible to the President alone and not to the people directly or through their representatives in Congress. This was, of course, the original system in England before responsible government was established.<sup>5</sup>

In the Executive Council selected for Colonel Simcoe was William Osgoode, Chief Justice of the Province, and thereafter, nearly as long as Upper Canada had a separate provincial existence, the Chief Justice of the Province was an Executive Councillor.

While the Lieutenant-Governor was head of the state, his Instructions specifically required him to act with the advice of the Executive Council in constituting townships or parishes, erecting fortifications, creating courts criminal and civil and of law and equity, appointing officers for such courts and granting land (this last being of the greatest importance); but he might act without such advice in dividing the Province into constituencies to return members of the House of Assembly, in raising armies and navies, exercising martial law, appointing captains, lieutenants and other officers, giving warrants for payment of public moneys, assenting to, refusing assent to or withholding any bill passed by the two Houses, appointing judges, justices of the peace, etc., pardoning offenders and remitting fines, establishing fairs and markets and removing or suspend-

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<sup>5</sup> The "Cabinet" system never prevailed in the Province of Upper Canada before the union of the two Canadas under the Union Act of (1840), 3, 4 Vict., c. 35 (Imp.). John Beverley Robinson when Attorney General "denied the existence of a ministry in the Province and claimed the right to act solely upon his own individual responsibility in the House and without reference to any supposed necessity for agreement with his colleagues." Lindsey's "Life of William Lyon Mackenzie," 2nd Ed. (Makers of Canada Series), p. 274. We shall see, however, that a few years later he was forced to resign from the Executive Council to carry out the wishes of the government.

ing any officer.<sup>6</sup> Substantially all the important civil business was thus in the hands of the Executive Council.

In addition to being a member (and president) of the Executive Council, Osgoode was also in analogy with the Lord Chancellor at Westminster made a member and Speaker of the Legislative Council, where it was his duty to introduce and explain the bills promoted by the Executive Council. In this office he was succeeded by the succeeding chief justices almost as long as Upper Canada existed as a separate Province.

There was no objection on the part of the people (so far as extant records show) to Osgoode's being an Executive Councillor (1792-1794) nor to his successor, John Elmsley (1796-1802); but Henry Allcock (1802-1806) was not so fortunate. William Weekes, a turbulent Irishman, who was a former student of Aaron Burr's, Joseph Willcocks, a former "United Irishman," and Mr. Justice Thorpe, another Irishman,<sup>7</sup> with a few others of less note, were all "agin' the gover'ment," and Allcock came in for his share of abuse.

But this was mere general abuse based upon his supposed services to Lieutenant-Governor Hunter and his being a member of the Council advising Lieutenant-Governor Hunter and Alexander Grant, the Administrator of the government between Hunter's death in 1802 and the arrival of his successor, Francis Gore, in 1806, no constitutional question was raised.

Allcock's successor, Thomas Scott (1806-1816), got into trouble with the House of Assembly in 1812 by releasing on *habeas corpus* Robert Nichol, who had been committed to the common gaol at York (Toronto) for breach of the privileges of the House of

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<sup>6</sup> See Royal Instructions to Lord Dorchester, September 12, 1791, 4 Ont. Arch. Rep. (1909), pp. 161-169; and Instructions to John Graves Simcoe, same date, do., do., p. 161.

<sup>7</sup> Weekes, the first law student called to the bar by the Law Society of Upper Canada (1799), was shot in a duel (1806) by his friend and colleague, William Dickson, at Fort Niagara, N. Y. Willcocks became an open traitor in the War of 1812 and was found dead in an American colonel's uniform after the attack on Fort Erie in 1814. Thorpe was "amoved" from his office; he was appointed Chief Justice of Sierra Leone in Africa, but came back to England in two years with some complaints about the government, and was cashiered. Thereafter he lived in London in obscurity.



Assembly in using disrespectful words concerning it. Samuel Street, the Speaker, had issued his warrant for the purpose and Nichol went to gaol; but on a writ of *habeas corpus* issuing under the Statute 31, Charles II, Chief Justice Scott, finding the warrant defective, discharged Nichol. The House was very indignant and resolved that the Chief Justice was "guilty of a violent breach of the privileges of this House." They passed an address of complaint to the Prince Regent (the King, George III, was insane); but Scott was right and the House was wrong; and soon the more important matters of the War of 1812 called the attention from this petty quarrel.<sup>8</sup>

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<sup>8</sup> The warrant of commitment, signed by Samuel Street, the Speaker of the House of Assembly, was general; it did not set out the privilege violated, the judgment of the House, etc., etc., as it should; and the Chief Justice was bound to give effect to the objection and to release the prisoner. For the proceedings in the House of Assembly, see Journal of the House of Assembly, Upper Canada, 9 Ont. Arch. Rep. (1912), pp. 41, 42, 43 (where the warrant is set out), 57, 58, 69, 70, 78, 79, 82, 87, in the Legislative Council, Journal of the Legislative Council of Upper Canada, 7 Ont. Arch. Rep. (1910), pp. 425 (where Scott's explanation is set out), 426. The Chief Justice also explained his action to the home authorities satisfactorily. Scott was a member of the Executive Council when he was Attorney General and before he was elevated to the bench.

The Journals of the House of Assembly for Upper Canada up to and including 1824 are published in convenient form in the reports of the Ontario Archives for 1909, '10, '11, '12, '13, '14; from 1825 on they must be read in the folio original. A reprint of these is much to be desired for the study of the interesting period of the history of Upper Canada in the decade before the rebellion of 1837.

That the court and any judge of it were compelled in law to grant a writ of *habeas corpus*, "a prerogative Writ of Right," to anyone imprisoned on the order of either House of Parliament, was decided as long ago as 1771 in the case of Brass Crosby, Lord Mayor of London, 3 Wilson's Reports, 188; 2 Blackstone's Reports, 754; as also that a legal cause of detention must appear upon the return of the writ (warrant of committal, etc.) or the prisoner be discharged; but it was also clear law that (in England at least) the order of either House was a conviction, into the validity of which the court would not inquire (R. v. Flower, 1799, 8 Term Reports, 314). The only thing to be looked at by the court was the return. As long ago as the reign of Charles II, in 1670, it was decided in Bushel's Case, Vaughan's Reports, 135, that the cause of imprisonment ought to be specifically stated. Chief Justice Scott was bound to give Nichol his liberty when he found the warrant of commitment defective.

But neither Scott nor any of his predecessors was believed to have any part in directing the policy of the Governor; and so he, like them, escaped an attack on constitutional grounds.

William Dummer Powell, the fifth Chief Justice (1816-1825), was in different case. Born in Boston, Massachusetts, in 1755, of good Tory stock, he was educated there, in England, and on the Continent; he was a student of the last royal attorney general of Massachusetts when the American Revolution broke out; he at once took up arms on the loyalist side. During the war he went to England and read law; came to Quebec and then to Montreal, where he practiced law till 1789, when he was appointed First Judge at Detroit for the District of Hesse. When the courts of Common Pleas were abolished in 1794 he became the first *puisne* justice of the new court of King's Bench, the chief being the Chief Justice of the Province yet to be appointed.

In 1807 Sir Francis Gore, the Lieutenant-Governor, recommended that he be appointed to the Executive Council as an honorary member—*i. e.*, without pay; and next year he was appointed.<sup>9</sup> Powell was still senior *puisne* justice of the King's Bench. He was as influential with Gore as Gore allowed anyone to be, by no means so influential as he was supposed to be, for he was considered the master of the administration, the power behind the throne. When Gore was succeeded by Isaac Brock in 1811, Powell was even more powerful; it is almost certain that it was he that drew the spirited reply of Brock to General Hull's bombastic proclamation, and he took a very active part in all public matters throughout the war. *Inter arma silent leges*—and also private feuds. After the war, during Gore's second residence in the Province as Lieutenant-Governor, Powell was promoted to be Chief Justice (1816).

During the administration of Samuel Smith (1817-1818) and the earlier part of that of Sir Peregrine Maitland, Powell was credited with great influence in the Council, and indeed until within two

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<sup>9</sup> Letter of Gore to William Windham, Secretary of State, from York, June 22, 1807, Can. Arch. Q. 306, p. 178; Gore to Castlereagh, Secretary of State, York, February 29, 1808, Can. Arch. Q. 311, I, p. 29; Order in Council, September 14, 1808, Can. Arch. Q. 311, II, p. 447. His formal "mandamus" was dated March 1, 1809, Can. Arch. M. 761. I confess to special interest in Powell: he was the first and I the last justice of the King's Bench.

years of his resignation in 1825 the suspicion was by no means without justification. He was often the subject of attack for the measures of the government; but it was not till the time of his successor that the constitutional objection was raised.

That the "Cabinet" view of the executive had not yet made its appearance is manifest from the fact that Powell strenuously opposed measures promoted by the Governor—and went so far as to enter "dissents" on the records of the Legislative Council, of which he was Speaker.

Chief Justice Campbell, a Scotsman, came to Upper Canada as a *puisne* justice of the King's Bench in 1811. He was recommended for the Executive and also the Legislative Council in 1814; but he was passed over and did not become a member of either until he was appointed Chief Justice late in 1825.

Campbell was not a pushing man, but he was early assailed in the House and the Province—not, it must be said, on account of sins of omission or commission of his own. The general election of 1824 had resulted in a victory for the party discontented with the government; Powell was *persona non grata* with this party and they were "after him"; he, however, escaped during the first session, and the blow intended for the second session he avoided by resignation. His successor was substituted for him and received his punishment. It must be said, too, that there was a sentiment already developing, although it seldom found definite articulate expression, in favor of responsible government. January 13, 1826, the House of Assembly passed by a vote of 23 to 14 the resolution, "That the connection of the Chief Justice with the Executive Council, wherein he has to advise His Excellency upon executive measures, many of which may bear an intimate relation to the judicial duties he may have thereupon to discharge, is highly inexpedient, tending to embarrass him in his judicial functions and render the administration of justice less satisfactory, if not less pure."<sup>10</sup> The House by

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<sup>10</sup> Journals, House of Assembly, U. C., 1825-6, p. 72. All the radicals were for the resolution and all the Tories against it; the same day the House passed *nem. con.* the resolution, "That it is highly expedient that the judges of the King's Bench in this Province should be as independent of the Crown and of the people as are the judges of England," *do., do.*, p. 73. The judges in Canada might yet be suspended by the Governors and dismissed by the Crown (*i. e.*, the home administration) at will; two judges



the same vote resolved that "an humble address \* \* \* be presented to His Majesty humbly praying that he will be graciously pleased to discontinue to impose on the Chief Justice duties so incompatible with his judicial character and so ill-suited to the state of this Province."<sup>11</sup> An address in these terms passed, January 14, on a vote of 20 to 13.<sup>12</sup> The Lieutenant-Governor, Sir Peregrine Maitland, informed the House in the speech from the throne on proroguing Parliament, "I will transmit to Earl Bathurst (the Secretary of State for War and Colonies) your address to His Majesty on the subject of \* \* \* the functions of the Chief Justice in this Province; but I am not enabled to explain to His Majesty's government what there is peculiar in the present state of this Colony which you allude to in the conclusion of your address as inducing you to desire the change which you solicit."<sup>13</sup>

Maitland duly transmitted the address, but deprecated the proposed change, saying that he required the advice of the Chief Justice in the management of the public business.<sup>14</sup>

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had been so "amoved"—for good cause, indeed, but the system was dangerous. The judges of this Province have always been independent of the people, and the Act of 1834, 4 Will. IV, c. 2, s. 1 (U. C.), rendered them irremovable by the Governor without an address of both Houses of Parliament. Journals, House of Assembly, U. C., 1825-6, p. 73.

<sup>11</sup> "Humble address," "humbly praying," the usual camouflage of our British ways. I never saw an humble Canadian politician, but they "humbly" pray in the same way as we write "My Dear Sir" to one we loathe and are the "obedient servant" of one we despise.

<sup>12</sup> Journals, House of Assembly, U. C., 1825-6, pp. 75, 76. Marshall Spring Bidwell was absent from the House; Charles Fothergill, too late, was afraid of losing his position of King's printer (which he did in consequence of his vote for the resolution), and Charles Ingersoll, of Oxford, did not vote; these reduced the vote to 20; all the good Tory votes were in evidence. Two thousand copies of the resolution and address were ordered to be printed January 15, do., do., p. 8.

<sup>13</sup> Do., do., p. 117; see also Can. Arch. Q. 340, I, 39-41. Maitland had them there; and as he prorogued the Parliament at once they could not reply or explain—if, indeed, they could explain,—for there was nothing in the condition of the Province different in 1826 from any other time, or in that of Upper Canada differentiating it from any other colony. The concluding words of the resolution were so much verbiage.

<sup>14</sup> See Maitland's dispatch to Bathurst (No. 2) from York (Toronto), March 7, 1826. Can. Arch. Q. 340, I, pp. 39-41. See also dispatch, same to same (No. 5), York, March 10, 1826. Can. Arch. Q. 340, I, pp. 222, 232.

Bathurst answered, "that it is highly expedient that the Governor should have the advice and assistance of the first law authority of the Province for his guidance in the administration of his government; that the greatest advantage has been derived in the colonies from this assistance, and that it does not appear that there is anything peculiar in the state of Upper Canada which should make it advisable that this system should be changed." Maitland duly transmitted the dispatch to the House, the House duly thanked him, and the matter was not further canvassed in Parliament in the session of 1827.<sup>15</sup>

But the country was not wholly silent; and in the next session the House passed a resolution, "That the Executive Council is appointed by His Most Gracious Majesty to advise His Excellency upon the affairs of this Province; and that the connection of the Chief Justice of this Province with the Executive Council wherein he has to advise His Excellency upon executive measures, many of which may bear an intimate relation to the judicial duties he may have thereupon to discharge, is highly inexpedient, tending to embarrass him in his judicial functions and render the administration of justice less satisfactory, if not less pure." An address to the King on these lines was voted by 19 to 6. This address (not the resolution) repeated the unnecessary and misleading reference to "the present state of the Province" which had given Maitland and Bathurst an advantage; and, naturally, the Governor, in promising to transmit the address, said, "I am not yet enabled to explain to His Majesty's Government what peculiarity in the present state of this Colony you allude to as inducing you to desire the change which you solicit."<sup>16</sup>

Maitland in transmitting<sup>17</sup> the address to William Huskisson (who had, August 17, 1827, replaced Viscount Goderich, the suc-

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<sup>15</sup> Dispatch from Bathurst to Maitland, Downing Street, June 8, 1826. Journals, House of Assembly, U. C., 1827, p. 10. For its transmission to the House, December 12, 1826, see Journal. Ho. Assembly, pp. 1, 4, 5, 7, 9. Five hundred copies were ordered to be printed for the use of the members, do., do., p. 12; the Governor was thanked, pp. 13, 15, 16.

<sup>16</sup> Journals, Ho. Assembly, U. C., 1828, pp. 100 (the resolution), 102 (the division and the address), 109 (Maitland's answer).

<sup>17</sup> Dispatch (No. 24), Maitland to Huskisson, York, May 15, 1828. Can. Arch. Q. 347, pp. 39-43.

cessor of Bathurst, April 30, 1827, as Secretary of State for War and Colonies), said that the subject awakened no public interest (in which he, relying upon the official class, was wrong) and that the address passed almost without debate (in which he was right, but it was because of the feeble opposition offered to its passage).

This Parliament was dissolved in July, 1828, and a general election was held in the same year.

Chief Justice Campbell was growing old, or thought he was, for men grew old sooner in those days—they ate too much and (especially) drank too much, and were filled with malaria from mosquito-bites. Campbell, just turned 70, was tired of official life and desired to be allowed to resign on a pension.<sup>18</sup> The Attorney-General, John Beverley Robinson, was recommended to fill the vacancy, if a vacancy should be allowed.<sup>19</sup> But Campbell had to undergo one more session of Parliament before finding surcease from his political troubles. The new Parliament met in January, 1829. Maitland had gone home and had been succeeded by Sir John Colborne (afterwards Lord Seaton), an old Peninsular War officer, in November, 1828.

We shall see that already the affairs of Upper Canada as well as those of Lower Canada, in this as in other matters, were receiving the attention of the Imperial Administration and Parliament, but I do not here interrupt the narrative of proceedings in the Colony.

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<sup>18</sup> It should, perhaps, be said that Campbell was a private in a Highland regiment and came to America with his regiment to take part in the Revolutionary War; he was under Cornwallis when that general surrendered at Yorktown in 1781, and suffered harsh treatment while a prisoner. He obtained his release in 1783 when peace was proclaimed, and went to Nova Scotia, where he was called to the bar and rose to eminence in his profession. He was made a *puisne* judge in Upper Canada in 1811. He was the first of our Chief Justices to be knighted. See Can. Arch. Q. 350, pp. 118, 122, 131, 132.

<sup>19</sup> See dispatch, Maitland to Sir George Murray (who had replaced Huskisson as Secretary of State May 30, 1828), from Queenstown, August 15, 1828. Can. Arch. Q. 347, p. 88.

Robinson could have had the chief justiceship in 1825 when Powell retired, but he declined; it was generally understood that Campbell was a "warming pan" for him. Maitland says of him in 1828 that he was willing to wait, Can. Arch. Q. 347, p. 88. Campbell expected a retiring allowance of £1,250, Can. Arch. Q. 353, p. 130; and got it, do., do., p. 66.



Colborne sent to the House, at their request, a copy of the answer of the home government to the address of 1828—"with respect to the Chief Justice retaining his seat in the Executive Council, it is a question which His Majesty's Government have taken into their consideration, and on which they must at present suspend their opinion."<sup>20</sup> In this Parliament appeared William Lyon Mackenzie as a member. He was a leader of the radical section of the Province and openly advocated "such a change in the mode of administering the government as would give the people an effectual control over the actions of their representatives and through them over the actions of the executive." Neither he nor the House generally were at all satisfied with the reply; but as the matter was under consideration by the home government, no further formal steps were taken during that session specifically in respect of the Chief Justice. All through the session, however, it was obvious that there was a deep-seated distrust of the Executive Council and dissatisfaction that it was wholly beyond the reach of any majority of the House. Mackenzie and Robinson, the Attorney-General, may fairly be called the protagonists of the two parties of reform and of privilege, the latter being in a permanent minority in the House of Assembly, but in full control of the Legislative and (of course) the Executive Council.

An address was passed to His Excellency asking him "to inform this House who form the Council appointed under the Constitutional Act, 31 George 3rd., chap. 31, to advise your Excellency upon the affairs of this Province." Colborne promised to lay the information before the House, and did so some ten days later. This showed that there were five executive councillors, including the Chief Justice.<sup>21</sup> This address was part of the general move-

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<sup>20</sup> Journals, Ho. Assembly, U. C., 1829, pp. 6, 16, 17 (the reply of the home government). The House had hoped and entertained "an anxious belief that under the auspices of His Excellency \* \* \* the administration of justice will rise above suspicion." This was by a vote of 36 to 6, the Attorney General, John Beverley Robinson, and five others of the "Old Guard" voting in the negative (one of them afterwards himself a Chief Justice in better times, Archibald McLean, 1862-8).

<sup>21</sup> They were James Baby (1794), Rev. John Strachan (1817), Chief Justice William Campbell (1825), James Buchanan Macaulay (1825), afterwards Chief Justice; Peter Robinson (1827), brother of the Attorney Gen-

ment for responsible government now become articulate, in great measure owing to the efforts of Mackenzie.

This would seem to be the proper place to sketch the proceedings in England in reference to the question.

There were constitutional troubles in Lower Canada not dissimilar to those in the Upper Province, but more acute, being to a certain degree accentuated by differences in race and creed. Representations were made to the home administration and the British people from both the Canadas, and May 2, 1828, Huskisson, Colonial Secretary in Wellington's administration, as he had been under Goderich, brought the question of the civil government of the Canadas up in the House of Commons as "involving the well-being and happiness of nearly a million of British subjects." He said that "in all parts of Canada the present system works so ill as to stand in need of alteration"; he repudiated the proposition to abandon the Canadas, which could not be done "without doing an injustice to their fidelity and tried attachment or without tarnishing the national honor." He moved for a select committee to inquire into the state of the civil government of Canada. Henry Labouchere (afterwards the first Baron Taunton), a leading member of the Opposition, agreed that "as long as Canada desired British connection, this country could not desert her." A select committee was appointed by unanimous consent, under Huskisson as chairman. "The Canada Committee," as it was generally called, reported, recommending amongst other things that judges should not sit in the Executive Council.

In the succeeding session at Westminster, February 23, 1829, Labouchere asked Sir George Murray, who had replaced Huskisson, May 30, in the preceding year (Huskisson disagreed with Wellington, the Prime Minister, over the Corn Laws, he being a free-trader), whether the government were to introduce a bill on the subject. Murray said that they were collecting information. The matter came up again, April 6, on a vote to improve water communication, with the same result. May 14 a monster petition signed by 3,110 persons at York (Toronto) was presented to the House by Edward Stanley (then member for Preston and after-

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eral, and George Herchmer Markland (1827). For the proceedings, see Journals, Ho. Assembly, U. C., for 1829, pp. 40, 42, 49 and 47.

wards thirteenth Earl of Derby), which asked amongst other things that judges should not have a seat in the Executive Council. The essence of the petition was local responsible government in the Colony. Murray agreed that there were good grounds of complaint, said that he was "of opinion that judges should not be of the Executive Council," and after some discussion the petition was withdrawn. Later in the session, June 5, Labouchere brought the matter up again, and Murray emphatically declared that it was his intention to bring forward some measure when he was in possession of sufficient information to enable him to frame one.<sup>22</sup>

Murray did not communicate to the Lieutenant-Governor his determination to exclude judges from the Executive Council, nor did he inform the Attorney-General, who believed that it was not intended to act on the report of the "Canada Committee."

The scene now changes to Upper Canada. Colborne in his official dispatches did not hesitate to say that most of the trouble in the House of Assembly was due to "the editor of a York paper so as to keep up a spirit of discontent";<sup>23</sup> and he did not exaggerate so very much.

During the Parliamentary recess the agitation for responsibility of the Executive to the House of Assembly was kept up; and it was still further accentuated by the elevation of the Attorney-General to the Chief Justiceship in July, 1829. Colborne hoped to make the Executive Council (as well as the Legislative Council) more satisfactory by gradually increasing the number of members; but this course did not meet with approval in Downing Street.

On January 12, 1830, the fourth day of the following session, the House passed a resolution (on a vote of 25 to 6) that it felt "unabated solicitude about the administration of public justice,"

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<sup>22</sup> See Hansard's Parliamentary Debates, New Series, Vol. XIX, col. 300, 308, 315, 316, 318; Vol. XX, col. 496; Vol. XXI, col. 460-463, 1331-1335, 1764-1766.

<sup>23</sup> See dispatch (No. 4), Colborne to Murray, from York, February 16, 1829. *Can. Arch. Q.* 351, I, 29. In the same dispatch Colborne said that the Chief Justice should continue to retain his seat, although at times he must be led too deeply into political matters, which in our day would be a conclusive reason why he should not retain his seat.

Private letter, Colborne to the Secretary of State, Sir George Murray, from York, December 9, 1829. *Can. Arch. Q.* 352, p. 261.



and was convinced that the "continuance about His Excellency of the same advisers who from the unhappy policy they have pursued have long deservedly lost the confidence of the country, is highly inexpedient and calculated seriously to weaken the expectations of the people from the impartial and disinterested justice of His Majesty's government," and it went so far as to refuse (on a vote of 28 to 3) "to accept as a Chaplain anyone appointed by the Executive Government." His Excellency curtly said, "I return you my thanks for this Address," and nothing more was done during that session specifically in reference to the Executive Council.<sup>24</sup>

In the House of Commons at Westminster the advocates of responsible government in Canada were not silent. May 25, 1830, Labouchere moved three resolutions (1) directed against "placemen" being in the majority in the Legislative Councils of the two Canadas, (2) "that it was the opinion of the House that it is not expedient that the Judges should hold seats in the Executive Councils of Upper and Lower Canada, and that with the exception of the Chief Justice they ought not to be involved in the political business of the Legislative Council," and (3) that these measures should be carried out without delay. Lord Sandon (Dudley Ryder, afterwards second Earl of Harrowby), M. P. for Tiverton, seconded the motion and pointed out the anomaly that "the same person advised in the morning in the Executive Council that certain laws should be proposed, voted upon them in the afternoon in the Legislative Council, and administered them in the evening on the Bench." He quoted from Blackstone: "Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and minister of state," and said that this was not a mere theoretical evil, that the greatest practical evils had already resulted from it, the judges had been converted into active political partisans (the converse was in fact true in Robinson's case), they talked in the legislature of the way in which they meant to interpret the laws upon the bench, and all confidence in the purity of the administration of justice in cases where the government was a party had

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<sup>24</sup> Journals, Ho. Assembly, U. C., 1830, pp. 10-14. For the debate in the House of Commons, see Hansard, Parl. Deb., New Series, Vol. XXIV, cols. 1093-1111.

been destroyed. Sir George Murray replied, admitting the impropriety of judges (except the Chief Justice) in the Legislative Council; but he opposed the resolutions as conveying an implied censure on the government. Labouchere, closing a lively debate, said that the evils of allowing judges to have seats in the Executive Council were so great that he would press his motions. They were lost by a vote of 155 to 94.

The discussion in the House of Commons was not without its effect.

The debate was variously reported in the newspapers; a rumor became current that the Chief Justice of Upper Canada was not to retain his seat in the Council. Robinson applied to Colborne to know if any instructions had been received on the subject, and being informed that there were none he continued to fill the position. It has already been pointed out that Murray did not tell Robinson that the recommendation of the "Canada Committee" was to be carried out in the Canadas.

Colborne, indeed, had protested against his suggested removal on the ground that the Chief Justice was chairman and most of the business was connected with legal questions, and the public would suffer considerably if such a change were made.<sup>25</sup>

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<sup>25</sup> Dispatch, Colborne to Robert William Hay (who became Secretary for War and Colonies in 1825 and continued in office until 1835), from York, September 17, 1830. Can. Arch. Q. 354, p. 270. Robinson's letter as to the discussion in the House of Commons, do., do., p. 271.

James Buchanan Macaulay (afterwards Chief Justice Sir James Buchanan Macaulay) was also a member of the Executive Council. He was sworn in the Executive Council June 27, 1826, on a warrant dated: Court at Windsor, May 5, 1825. He sat in Council until July 2, 1829, inclusive. The next meeting was held on August 3, and he was not present when Chief Justice Robinson was sworn in. On August 25 Macaulay, who had received a commission as a judge of the Court of King's Bench, dated July 13, was present and took the oath of office as a judge of the Court of King's Bench, after which he withdrew. See also Hansard, Parl. Deb., N. S., Vol. XXIV, col. 1101.

Colborne in this dispatch says that the seat in the Council was held *ex officio*. This is a mistake shared by Major General C. W. Robinson, C. B., in his "Life of Sir John Beverley Robinson," Blackwoods, Edinburgh and London, 1904. At page 200 the son, speaking of the positions of President

The House of Assembly in Upper Canada showing itself so antagonistic to the government throughout the whole session, it was expected that the Governor would take the sense of the people by ordering a general election; and the death of King George made this course imperative. Mackenzie and the radicals generally were not idle. Mackenzie published a series of letters to Colborne advocating his principles (most of which are now commonplaces in our system), and the agitation became general. But the majority of the voters were not prepared to go the lengths advocated by the advanced reformers; these overdid it, and by one of those revolutions of sentiment not uncommon in any democracy (with or without a capital D) a majority was given the Tory, or government, party.<sup>26</sup>

The House met January 7, 1831, and during the same month arrived a dispatch from Murray to Colborne that the home administration, then tottering toward its fall, had determined to adopt the policy that the Chief Justice should not sit in the Executive Council. Colborne sent this to Robinson and the Chief Justice at

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of the Executive Council and Speaker of the Legislative Council, says: "These posts were filled *ex officio* by the Chief Justice until the Union of the Canadas in 1841, when the occupants of the bench ceased to hold any political office." This statement is wholly erroneous. The Constitutional Act of 1791, 31 George III, c. 31 (Imp.), by sec. 12 provided for the appointment of the Speaker for the Legislative Council by warrant under the great seal of the Province, and as a matter of fact, more than once the Chief Justice was not the Speaker, but someone else was; for example, William Dummer Powell was for some time Speaker of the Legislative Council before the resignation of Chief Justice Scott; and Mr. Justice Jonas Jones was Speaker (1836-1840) during part of the time of Robinson's chief justiceship. Moreover, Vice Chancellor Robert Sympson Jameson was Speaker of the Legislative Council after the union for some years (1841-1843).

Again, there was no necessary relationship between the presidency or even a membership of the Executive Council and the chief justiceship.

<sup>26</sup> Perhaps the normal relative standing of the parties is best shown in the vote, February 1, 1831, when on a division the House voted down, 24 to 17, a motion for an address asking the Governor "whether he has been authorized and directed by His Majesty to summon to the Legislative Council of this Province any person now a member of this House," Journals, House of Assembly, U. C., 1831, p. 35. The vote on the speakership, 24 to 17, may have been partially on personal grounds.



once, January 24, 1831, sent in his resignation of his seat there.<sup>27</sup>

For some reason which does not appear no information was given to the House of Assembly of the dispatch or of the resignation, and that body was allowed to remain in ignorance of the facts.

<sup>27</sup> The following is the official record:

25th January, 1831.

Executive Council Chamber at York, 25th January, 1831. Present: The Honl. John B. Robinson, Chief Justice, Chairn.; The Honorable James Baby; The Honl. & Venl. John Strachan, Archdeacon of York. The Honl. Peter Robinson read the following letters:

Government House, 24 January, 1831.

*Chief Justice to be no longer of the Executive Council—Mr. Secretary Mudge to Presiding Councillor.*

Sir:

I have the honor by the direction of the Lieutenant Governor to transmit to you the enclosed letter from Mr. Chief Justice Robinson and to express His Excellency's regret that, under present circumstances, the Province can no longer receive his able assistance as chairman of the Executive Council, in consequence of His Majesty's Government being of opinion that the Chief Justice of the Province should not take his seat at the Council by virtue of his office.

I have the honor to be,

Signed, Z. MUDGE.

York, 24 January, 1831.

To the Presiding Councillor.

J. B. Robinson, to Sir J. Colborne:

I beg leave to thank Your Excellency for your early communication of the dispatch of Sir George Murray announcing the intention of His Majesty's Government to carry into effect the recommendation of the Committee of the House of Commons that the Chief Justice of these Colonies shall no longer continue to be members of the Executive Council.

Your Excellency will oblige me by communicating to the Council, whenever they may be next summoned, that upon reading in the newspapers, last summer, a statement to the same effect, I applied to Your Excellency to learn whether any such intimation had been conveyed to Your Excellency, and finding that none had been I did not deem it right to take any other step, in consequence of this statement in a newspaper, than to address myself, through Your Excellency, to the Secretary of State, expressing in the first place my conviction that there could be no intention on the part of the government to make an exception in my case to general usage, and begging to be informed whether any new arrangement had been made upon this point which was intended to be applied to the North American Colonies generally.

It appeared to me most probable that a change had been determined upon, and I only waited that official announcement of it which Sir George Murray's letter conveys and which now renders my retirement from the

Mackenzie in this session raised specifically the question of the appointment and powers of the Legislative Council, and that carried with it the question of judges, Chief Justice or others, sitting

Council a mere act of obedience to His Majesty's pleasure, which I very cheerfully render.

I am grateful for the condescension of Sir George Murray in expressing his regret that he had given me no intimation of this intended change in the Colonial Governments before my present office was conferred upon me, but I am unable to understand upon what ground it is intimated that in the absence of such a communication any other guide could have been taken than the royal commission and instructions to Lord Dalhousie, although these were dated in 1820, since it was that commission which His Excellency Sir James Kempt was administering, and it was under its authority and upon those instructions which accompanied it that the Government of all the Colonies has been since carried on, and is necessarily carried on to this moment. I need hardly say that I could not have acted upon instructions of which I had no knowledge and which are only now announced to be in a state of preparation.

I have the honor to be Your Excellency's faithful and obedient servant,  
Signed, J. B. ROBINSON.

Upon these letters being read, the Chief Justice took leave of the Council and withdrew." Can. Arch. State, I, p. 481.

General Robinson, with the irritating inaccuracy and insufficiency with which he treats of Sir John's career in Canada—he has enough and to spare of his life in England—says: "My father \* \* \* resigned the presidency of the Executive Council about 1832." The date is in the official documents and is certain, while the resignation was of membership and not simply of the presidency of the Executive Council.

The following is the official dispatch from the Secretary of State to Colborne:

*Private.*

Downing Street, 1 Novr., 1830.

Dear Sir:

I have the honor to acknowledge the receipt of your private letter of the 17 Sept. last, with its inclosure from the Chief Justice of Upper Canada, relative to the intention which had been announced in the papers laid before Parliament, of discontinuing that officer as a member of the Executive Council, which Mr. Robinson appears to consider as a measure liable to misconception, and to have an effect in the Province prejudicial to his character. I regret extremely that Mr. Robinson should for a moment have felt uneasiness at an alteration which has not the slightest personal reference to him, and which is adopted by His Majesty's Government in compliance with the recommendation of the House of Commons.

On the appointment of Sir James Kempt to the Government of Canada, he was informed by me in July, 1828, that it was not deemed expedient to proceed with his commission and instructions as Governor in Chief until

in that House. All parties were by this time desirous of the independence of the judges of the crown, and the radicals endeavored to have added, as a rider to the address asking for such independence, a further request "that Your Majesty will also be pleased to take the necessary steps for excluding the judges from seats in the Legislative Council in this Province." This was lost by a vote of 18 to 13.<sup>28</sup> But the agitation was not abated; on the contrary, it was intensified, and the absurd attempt at expulsion of Mackenzie from the House<sup>29</sup> did not help to allay public disquiet.

In the Parliamentary recess which followed the prorogation of the Parliament, March 16, 1831, political passion rose to a great height. Mackenzie was everywhere, and everywhere a great power.

When the House met again, November 17, 1831, it was apparent

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the report of the Committee of the House of Commons had been taken into the consideration of His Majesty's Government. The instructions, from various causes which it was impossible to anticipate, were delayed much longer than it was intended, and in point of fact they are only now in the course of preparation. The Committee of the House of Commons, as you are aware, made their report in July, 1828, and several months *subsequently*, viz., in April, 1829, Mr. Robinson was appointed Chief Justice of Upper Canada.

If Mr. Robinson had taken his seat as a member of the Executive Council by virtue of any royal instruction issued after the report of the Canada Committee, I am willing to admit that he might have had reason to consider the proposed alteration as in some degree reflecting personally on himself. I am, however, informed that Mr. Robinson has merely been acting in the Executive Council under the instructions to Lord Dalhousie of 1820, and I therefore cannot but consider that he has taken an erroneous view of the subject. At the same time, I regret that an intimation of the intention of His Majesty's Government to adopt the recommendation of the Canada Committee was not given to Mr. Robinson at the period of his appointment, which would have prevented any possible misconception as to the cause of the Chief Justice being no longer continued as a member of the Executive Council.

I have the honor to be, Dear Sir, your faithful and obed. servt.,

Can. Arch. G., 66, p. 261.

G. MURRAY.

<sup>28</sup> Journals of House of Assembly, U. C., pp. 6, 94, 96. Oddly enough, particularly as Mackenzie was the printer, this does not appear in the Index to the Journals.

<sup>29</sup> The pretext being that he had abused the trust placed in him as printer of the Journals of the House by distributing some copies without the appendix and for political purposes. To the credit of the House, this rankly tyrannous attempt was rendered abortive by a vote of 20 to 15.



that the demands on the part of the reformers of the Province had been of considerable effect. Sir John Colborne, in his speech from the throne on opening Parliament, announced that he had received the royal command for the enactment of a statute that the judges should be appointed *pro vita aut culpa* and not during the royal pleasure.<sup>30</sup>

Nothing was said about the appointment of judges to the Councils, and the pertinacious Mackenzie gave notice next day that he would move an address for the names of members of the Councils, etc., etc. The motion was not made at the time for which notice was given, but a strong hint was thrown out in another address, and November 30, 1831, the Lieutenant-Governor sent a message, "he now acquaints the House of Assembly that in further pursuance of the general design of imparting to this Colony the benefit of the important principle of the British Constitution, the independence of the judges, it is His Majesty's settled purpose to nominate on no future occasion any judge as a member of the Executive or of the Legislative Council, and that the single exception to this general rule will be that of the Chief Justice of Upper Canada, who will be a member of the Legislative Council in order that they may have the benefit of his assistance in framing laws of a general and permanent character; but that His Majesty will not fail to recommend even to that high officer a cautious abstinence from all proceedings by which he might be involved in any political contention of a party nature."<sup>31</sup> This did not satisfy Mackenzie, nor could it; the Chief Justice was the person aimed at. He made his motion December 2, 1831, only to have it postponed by a vote of 21 to 13. An attack upon Mackenzie himself, looking toward his expulsion from the House for alleged libel on the House, began next week, and December 13 he was expelled by a vote of 24 to 15. His motion therefore lapsed.<sup>32</sup> He was at once re-elected, January 2,

<sup>30</sup> Journals, House of Assembly, U. C., 1831, p. 7. I have not found this dispatch in the Canadian Archives.

<sup>31</sup> Journals, House of Assembly, U. C., 1831, pp. 8, 12, 24.

<sup>32</sup> The address proposed asked for the communications with the imperial administration *inter alia*, concerning "the appointment, mode of selection, duties or constitutional character of the Legislative Council and Executive Council \* \* \* and \* \* \* concerning the continuation of the Reverend Doctor Strachan and the judges of the King's Bench in situations which cause them

1832. The same day he published in his newspaper, the "Colonial Advocate," "Articles of Impeachment or Public Accusation" against Colborne, charging him amongst other things with giving "injudicious advice to His Majesty's government \* \* \* in his opinion laid before the House of Commons, that the Chief Justice ought for many reasons to remain a member of the Executive Council"; and he was again expelled, January 7, 1832, without having had a chance to renew his motion.<sup>33</sup> He was re-elected on a poll by 628 votes to 96 for his opponent, the third candidate having retired when he found he could muster only 23 votes. His further experiences are not of moment here. It may, perhaps, be said that he visited England and had many interviews with Goderich (who had succeeded Murray as Secretary of State), resulting in Goderich's strong dispatch to Colborne dealing with the complaints of Mackenzie.<sup>34</sup>

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to take an active part in the executive and legislative business of the Province and to interfere in the regulation of its political affairs." Journals, House of Assembly, U. C., 1831, pp. 29, 32-39.

<sup>33</sup> Do., do., pp. 77-79, 84.

<sup>34</sup> (No. 162) dated from Downing Street, November 8, 1832, Journals, Ho. Assembly, U. C., pp. 95-99. In this dispatch Goderich pays a tribute to the Canadian people which I have not read elsewhere. Referring to Mackenzie's allegation that the existing House of Assembly was chosen by the people in a state of dejection and despondency as to a reform of abuses, Goderich says:

"To sustain his argument he is compelled to draw a picture of the Canadian character in which I am confident that he does \* \* \* great injustice.

"I am well persuaded that no people on earth are less likely to yield themselves to the unmanly weakness of despairing of the public good and of betraying their own most sacred duties in so pusillanimous a spirit."

He absolutely disbelieves "that in the year 1830 an utter despair of vindicating the public liberties had taken possession of the minds of the inhabitants" of Upper Canada. He also repudiates any responsibility for language said to have been used by Chief Justice Robinson when he was a member of the Assembly in respect of education and the proposed university (p. 97). He is not at all sure of the advisability of having bishop or archdeacon in the Councils, but rather thinks they "would be predisposed to the opinion that by resigning their seats they would best consult their own personal comfort and the success of their designs for the spiritual good of the people." He did not know Dr. John Strachan. For Mackenzie's representations to Goderich, see Can. Arch. Q. 380, the whole volume. Goderich's dispatches to Colborne will be found in do., do., Q. 376, pp. 806, 842. Many of Mackenzie's representations are also in Q. 376.

It may be said, too, that Lieutenant-Governor Colborne was not satisfied; we find him urging the appointment of a properly qualified person to preside at the Executive, and suggests that Mr. Justice Macaulay should be appointed President of the Council with a salary.<sup>35</sup> This proposition was not acceded to, and we hear now the last of judges on the Executive Council.<sup>36</sup>

It forms no part of the purpose of this paper to trace the course of agitation resulting in actual rebellion which ultimately brought about responsible government; nor do I say more as to the membership of judges of the Legislative Council.<sup>37</sup>

WILLIAM RENWICK RIDDELL.

*Osgoode Hall, Toronto, December 24, 1921.*

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<sup>35</sup> Private letter, Colborne to Robert William Hay, Permanent Under Secretary of State for War and Colonies, from York, January 17, 1834. Can. Arch., Q. 381, p. 80. Colborne was rather given to writing private dispatches to Hay; he even claimed that these would give the Secretary of State information on official matters, for which assumption he was rebuked. Can. Arch. Q. 317, pp. 98, 140. He had, however, written Lord Stanley (who replaced Goderich as Secretary of State for War and Colonies, April, 1833) recommending Mr. Justice Macaulay, 'who had no objections to take the office, if properly paid, "to preside at the Executive Council, to devote his whole time to public affairs and prepare reports of legal cases," with a salary of not less than £1,000. Dispatch from York, January 7, 1834, Can. Arch. Q. 380, p. 1.

<sup>36</sup> Mackenzie continued to complain, probably with justice, that Colborne allowed himself to be wholly directed by the Chief Justice, and he urged Colborne's removal. Letter, Mackenzie to Lord Stanley, from Toronto, April 28, 1834, Can. Arch. Q. 384, p. 625.

<sup>37</sup> Those interested in the latter topic may consult two articles of mine on "Judges in the Parliament of Upper Canada," 3 MINNESOTA LAW REVIEW (February and March, 1919), pp. 163, 344 sq.; the former topic is part of the general history of Upper Canada, for which may be consulted Kingsford's History of Canada, Vol. IX, X (interesting, but unreliable in matters of detail); Lindsey's Life of William Lyon Mackenzie (accurate if not quite complete); Dent's Rebellion in Upper Canada (frankly radical and with little or no claim to impartiality); General Robinson's Life of Sir John Beverley Robinson (utterly inadequate on this subject); Sir Francis Bond Head's Narrative (as extraordinary a story of self-satisfied wrong-headedness and "how not to do it" as was ever written); and first, last and all the time, the collections in the Dominion Archives at Ottawa.



(Vol. LV)

(No. 2)

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*"Search for the truth is the noblest occupation of Man; its publication a duty."*

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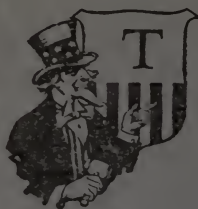
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## A COURT SEVEN HUNDRED YEARS AGO.

For the true lawyer, not the mere bread and butter lawyer, there can be no greater intellectual pleasure than to observe the beginnings of his science—and for most lawyers on this continent, these are to be sought in England.

The Selden Society, founded in 1887 with a comparatively small number of members, mostly English, has published volumes of the greatest value in connection with early English laws.

In 1903 appeared the first volume of their edition of the Year Books covering the years 1307 to 1309, 1 and 2 Edward II<sup>1</sup>—the volume is under the efficient editorship of Professor F. W. Maitland and is worthy even of his high reputation. It is a perfect mine of treasure for the Common Lawyer (not the common lawyer) but the Chancery practitioner will find nothing to interest him—*procul o, procul este, profani*—there is much equity but no Equity.

The Reports called the Year Books seem to have begun about 1285; contrary to what we oldsters were taught<sup>2</sup> they are now considered a private enterprise “books \* \* \*

“The Publications of the Selden Society, *peri pantòs tèn 'eleuterian* (Volume xvii) for the year 1903.” There is no attempt at originality in this article. I freely borrow wherever I find material to suit my purpose, and everyone is welcome to use as he will anything I may say.

<sup>2</sup>Blackstone, Commentaries, 1st Edition, 1765, Book I, pp. 71, 72. “The reports are extant in a regular series from the reign of King Edward II, inclusive, and from his time to that of Henry VIII, were

taken by the prothonotaries or chief scribes of the Court at the expense of the Crown and published annually, whence they are known under the denomination of the Year Book.” Maitland, with quiet sarcasm, says: “Blackstone \* \* \* knows all about it,” p. xii, n. I. Maitland and Sir Frederick Pollock have placed all lovers of law and especially of English law, under a heavy debt of gratitude, and the death of the former in 1906 was a great blow to the scientific study of the origin and evolution of the Common Law.



made by learners for learners, by apprentices for apprentices."<sup>3</sup>

The Year Books have not received the attention which they deserve and as Maitland says, "It will one day seem a wonderful thing that men once thought that they could write the history of mediaeval England without using the Year Books."<sup>4</sup>

Heretofore students of law have been rather repelled by the language in which they were written—the "Frenche \* \* \* after the scole of Stratford attebowe," which Chaucer's Pilgrim "spake ful fayre and fetisly. \* \* \* For Frenche of Paris was to hire unknowe"<sup>5</sup> French, uncouth as it was, made still more so by the numerous contractions and errors in printing. I must confess to a fascination and a delight in unraveling the meaning sometimes even the words themselves.

Now, however, that excuse is removed—on one side is the French, on the other a good translation<sup>6</sup> while the reports are illustrated and explained by the Court Rolls. Some amusement will be derived by those perusing these volumes from the remarks of judges and counsel. Maitland quotes Bereford, Chief Justice of the Common Bench, as saying to counsel, "We wish to know whether you have anything

<sup>3</sup>P. xiii, "Apprentices" are of course Blackstone's *apprenticii ad legem* "admitted after a considerable period of study, or at least standing, in the inns of court \* \* \* in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners and not qualified to execute the full office of an advocate till they were sixteen years' standing." Black. Comm. Bk. III, pp. 26, 27, "or at least standing" is good—let no one say that Blackstone has no sense of humor!

<sup>4</sup>P xx, Just as some imagine that they can write the history of the Scottish language without using

the Statutes of Scotland, and some imagine that they can write the history of Canada without using the Archives at Ottawa.

<sup>5</sup>Chaucer's Canterbury Tales. Prologue II, 120-122, speaking of "a Nonne, a Prioressse that \* \* \* was ful simple and coy \* \* \* cleped Madame Eglentine \* \* \* ful, pleasant and amiable of port"—one of the most delightful portraits in all literature.

<sup>6</sup>I trust I may not be accused of undue presumption when I say that I disagree with some of the translations and interpretations—in no case but one is the difference of importance to the meaning.

else to say, for as yet you have done nothing but wrangle and chatter." "*Nous voilloms savoir si vous voillez autre chose dire, qe ceo qe vous dites n'est qe jangle et riot.*" Many a modern judge has been the victim of "jangle and riot," and must needs stand it. Bereford does not say, "they would eat their cake and have it," but, "they want both the chicken and the half penny." "*Il vodreient volunters avoir la gelyne et la mayle.*"<sup>7</sup> These are not to be found in this first volume but Bereford being apparently a puisne Justice of the Common Bench has something not unlike the former outbreak, "you talk at random." "*Vous dites talent.*"<sup>9</sup> When Simon of Paris, who claimed to be a free citizen of London, went down to his birthplace and was taken as a villein "in his nest," "*en soun ney*," Bereford said, "I have heard tell that a man was taken in a brothel and was hanged, and if he had stayed at home no ill would have befallen him. So here (*ausint de cest part*). If he was a free citizen why did he not remain in the city?"<sup>10</sup> To a counsel advancing good law against a woman, he said, "Now you have argued well for the woman."

<sup>7</sup>P, xvi: "Gelyne" is of course the Latin "gallina," Modern French "geline" hen; "Mayle" is mentioned in Fleetwood, Chron. Prec. Ref. "Till about 1544, the silver money of England consisted of groats, half-groats, pence, half-pence, called old mails, and farthings."

<sup>8</sup>Foss' "Judges of England, 1066-1870," p. 84, says that Bereford was a Justice of the Common Bench in the time of King Edward I and that his Patent was renewed on the accession of Edward II; he became Chief Justice on March 15, 1309.

<sup>9</sup>P. 66 or "*Vous dites vostre talent*," p. 143.

<sup>10</sup>P. 12, I may be permitted to translate that other saying of his (not following herein the modesty of Maitland.) Bereford thought suit of court could be apportioned

and said to objecting counsel "*Cum la pucelle dist au vallet qe li demanda si ele fust pucelle 'Assaiet, assaiet, assaiet,' auxi assaiet vous, et si la seute ne serra aporcioné mei blamet.*" "As the girl said to the fellow when he asked if she was a virgin, 'try and see, try and see, try and see'—so you try and see and if the suit be not apportioned blame me for it, call me what you like." p. xvi, "Vallet" is the old French "vaslet," modern French "valet," it originally meant the son of a knight, but became degraded in meaning. At this time it was already applied to the serving man, "Blamer" has still sufficient of its original meaning in the low Latin "blasphemare" to connote abusive reproach although it also conveyed the meaning of our modern "blame."

"*Ore avez vous bien pledé pour la femme*"—and went on and proved his gibe by giving judgment for her;<sup>11</sup> and to another counsel he said, "Now you have said enough and more than enough."<sup>12</sup> A most cogent saying we find true every day, is made by Brabazon,<sup>13</sup> Chief Justice of the King's Bench. "There are cases in which a man may have a right but no proof of his right; and for want of proof, the right itself is a very weak, simple thing," "*et si la prove defaute, le dreit est mult feble et simple en sey.*"<sup>14</sup>

The most interesting thing in the Report is the early appearance of many of our modern principles. A writ brought as against two in severalty cannot be sustained if on "the day when the writ was purchased," "*le jour quant le bref fut purchacé,*" the defendants held in common, although on the day of plea pleaded they held in severalty.<sup>15</sup> Translated into our modern terminology the rights of a plaintiff in an action are determined as of the teste of the writ, and this principle our courts were called on specifically to lay down in 1897 in *McLean v. McLean* (1897) 17 P. R. 440.<sup>16</sup>

While in most cases the party seems to have appeared in person, the attorney was not unknown. Until 1236 all suitors must appear in person but after appearance they could appear by attorney if an attorney at law was appointed for that purpose by Letters Patent under the Great Seal or by Parliament. In 1236 an Act of Parliament provided that "every freeman which oweth suit to the County, Tything,

<sup>11</sup>pp. 151. 152.

<sup>12</sup>p. 161:

<sup>13</sup>Foss, p. 111, says that Brabazon was a justice itinerant for pleas of the forest in 1287 and became a puisne justice of the King's Bench, in 1289, Chief Justice in 1295, re-appointed on the accession of King Edward II, he remained Chief Justice until he retired full of age and honours in 1316.

<sup>14</sup>P. 183.

<sup>15</sup>p. 138. "Once bad, always bad." "*Une foitz malvays, et tot temps malvays,*" says counsel, and the Court agrees.

<sup>16</sup>Curiously enough the Appellate Division (of which I am a member) had to reverse a contrary holding at the trial within the last few years.



Hundred and Wapentake or to the Court of his Lord may freely make his attorney to do those suits for him."<sup>17</sup> This, however, referred to local courts only and not to the Courts of the King; and in 1285 it was enacted that suitors in all Royal Courts, Sheriffs' Courts and Courts Baron might "make a general attorney to sue for them in all Pleas \* \* \*"<sup>18</sup> Seven years thereafter the judges of the Court of Common Pleas were directed by Parliament to provide a certain number of attorneys in every County to attend the Courts, so that there were many attorneys available at the time in question. They probably were not always of the highest grade intellectually or otherwise—at all events in 1402 Parliament complained of "Sundry Damages and Mischiefs that have ensued before this time to divers Persons of the Realm by the great Number of Attornies ignorant and not learned in the Law as they were wont to be before this time."<sup>19</sup> To assure practitioners of the former stamp, it was ordained that "all the Attornies shall be examined by the Justices and \* \* \* they that be good and vertuous and of good fame shall be received and sworn."<sup>20</sup> Since which time attorneys have all been "good and virtuous and of good fame." And that Lord Chancellor can never be sufficiently reprobated who upon being asked for a shilling to bury an attorney, handed over a guinea and said, "Bury twenty-one of them."<sup>21</sup>

<sup>17</sup>(1236), 20 Henry III, c. 10.

<sup>18</sup>Statute of Westminster the second, 13 Edw. I. c. 10.

<sup>19</sup>Statute (1402), 4 Henry IV, c. 18. I give the usual translation, but "before this time" where the words first occur are in the original "*devant ces heures*," "before these hours" and where they occur for the second time, "*pardevant*," "formerly," the time-honoured "*laudatores temporis acti* and mourning for the good old time.

<sup>20</sup>Statute (1402), 4 Henry IV, c. 18. The original reads, "*ceux qui*

*sont bons et virtuouses et de bone fame*"—the "bone" is the modern French "*bonne*" and has no reference to either head or fingers of the attorney.

<sup>21</sup>Within half a century or so, attorneys got so thick in East Anglia that Parliament had to interfere and direct that there should be only six in Norfolk, six in Suffolk and two in Norwich; (1455), 33 Henry VI, c. 7, the statute says (I translate the Latin), that for a long time and until recently, there were only six or eight attorneys in

Already in 1307 it was decided that the authority of an attorney ceases with judgment.<sup>22</sup> That point has more than once come up in our Courts—the first time in *Brock v. McLean* (1826), Taylor Rep. U. C., p. 402.<sup>23</sup> But our Courts have not gone so far as to hold that to try to appear for a litigant at the termination of an attorney's authority is a contempt. One Hugh of Grantchester in 1308 proffered himself as attorney after his former client had acted for himself, and Stanton, J., sternly said, "*Vous serrez digne d'avoir penance. Et purceo gardez vostre jour d'oyr vostre jugement Lundy \* \* \**" You ought to be punished—therefore keep your day Monday to hear judgment." Hugh was wise enough to absent himself (possibly Stanton, J., had winked) to avoid punishment; "*l'attourné se absenta de gree pur eschuer la penance qe lui duist avoir esté ajuggé \* \* \**" And we hear nothing more of the unfortunate occurrence.<sup>24</sup>

Distress was a very common head of action in those days—it was already law that where there is a debt such as an annuity actually secured by power of distress, an action will lie for the debt and the creditor is not bound to rely upon his power of distress.<sup>25</sup> As Friskenev, one of the

the two counties and the town of Norwich, whereby there was real tranquillity among the people, but now there were 80 or more who had nothing to live on but their occupation of attorney and they stirred up suits for their private profit. It is hard for us in these more enlightened days to understand the terrible wickedness of some lawyers in the time of the Lancastrian Kings.

<sup>22</sup>p. 5, "*Nota ou cely qe fut atorné en le principal plee voleit avoir respoûndu com atorné en le scire facias.*" "Note the result when an attorney in the principal action wished to appear as attorney on the subsequent *scire facias*." "*Ne*

*put mye estre receu pur ceo qu'il ne fut pas atourné fors en le bref original le quel bref avoit perdue sa force quant le jugement fut rendue.*" "He could not be accepted because he had only been attorned only on the original writ and that writ had lost its force when judgment was rendered."

<sup>23</sup>Quoting and following *Tipping v. Johnson* (1801), 2 B. & P. 357.

<sup>24</sup>Anon, p. 98.

<sup>25</sup>*Eure v. Meynill*, p. 34. Notwithstanding the fact that the argument that the deed itself had fixed the remedy was answered seven hundred years ago, I have had twice to decide on such a defence in my short judicial career.

prominent Counsel, said, "*Si j'ay ij voies, a moi est a estire.*" "If I have two ways I have the choice."

Distress *damage feasanl* also was well known but not even ferrets can be seized for damage in a rabbit warren after they have made their escape out of the warren, for said Stanton, J., "*Noun, et covent, &c., qe la prise, &c., soit fait denz vostre garreine.*" "No—and it is necessary that the seizure be made in your warren."<sup>26</sup> So in *Buist v. McCombe* (1882), 8 Ont. Ap. R., 598, when the owner of premises seizes cattle in his grain, and not finding a pound keeper lets them go, he cannot seize them for the damage done to his grain if he catches them in his meadow.<sup>27</sup>

The question was raised whether one of three parceners—our co-parceners<sup>28</sup>—could distrain damage feasant upon a co-parcener. Apparently it was decided that this could not be done. This corresponds with the rule that co-parceners cannot have an action of trespass against each other, but in modern times the plaintiff and defendant would not be considered "co-parceners," that term being restricted to those claiming by descent only.<sup>29</sup>

<sup>26</sup>*Boyden v. Alspath*, p. 87.

<sup>27</sup>See also on this point *Vaspar v. Edmonds* (1701), 12 Mod. R. 658, 660; Co. Lit. 161 A.—the cattle must be actually damage feasant, *i e.*, doing damage at the time of seizure. *Wormer v. Biggs* (1845), 2 C. & K. 31.

<sup>28</sup>The word "coparceners" is invariably used in modern times but "parcener" is employed throughout the report. "Where a man or woman seized of lands or tenements in fee simple or feotail hath no issue but daughters and dieth and the tenements descend to such daughters who enter into the lands descended to them, then they are called parceners and are but as one heir to their ancestor." In the case *De la*

*More v. Thwing*, p. 179, *Duncan* had owned the manor, dying he left three daughters, Emma, Helewise and Muriel. From Muriel as heir at law the plaintiff inherited by divers mesne descents—his grayhound ("Leverer"), chased conies in a wood on said manor and the defendant who had become owner by purchase of the former interests of Emma and Helewise distrained it damage feasant—the defendant claimed the whole by prescription, and issue was joined thereon.

<sup>29</sup>The modern rule is that if one co-parcener convey her share, the co-parcenary is broken, *Reed v. Taylor* (1833), 5 B. & Ad. 575; 2 N. & M. 508; Co. Litt. 374 (a).



At the present time if such a question were to arise, the Judge would send for the latest edition of Woodfall or Foa, read the paragraphs on Distress, if he were unusually and unreasonably finicky look at the cases cited to see if they supported the text and decide accordingly. In those days there were no such *auxilia*, possibly a manuscript of Glanville or Henry of Bratton (our "Bracton") or Azo,<sup>30</sup> was available but there is nothing to indicate that anything of the kind was used—and there were no Reports, so they had in great measure to make the law as they went along by declaring it. On the other hand they had an advantage in the absence of conventions interfering with freedom of language, if not of speech; and they enjoyed a latitude in that respect denied to their successors of this age, except on the golf links and then only when playing with another lawyer, judicious if not judicial. Bereford will "emphasize a rule of law by *Noun Dieu!* or *Par Seint Piere.*"<sup>31</sup> Probably such language was not real swearing, but rather in the nature of "No, by gosh," and "By Judas," sometimes heard wafted over the greens from judicial lips, *coram non judice*.

Human nature being much the same on all ages, we need not be astonished to see that the Judges, conscious as they were of each other's shortcomings, took now and

<sup>30</sup>The influence of Azo, who knew the Civil Law from A. to Z., upon our early English law, is only beginning to be understood. All lovers of the Common Law should read Volume VIII (1904) of the Selden Society's publications, "Select Passages from Bracton and Azo, edited by Professor F. W. Maitland," Crown 4to. "This volume contains those portions of Bracton's work in which he follows Azo, printed in parallel columns with Azo's text. The use made by Bracton of the works of Bernard of Pavia, and the canonist, Tancred,

is also illustrated."

<sup>31</sup>Introduction, p. xv. I use Maitland's words. The translator of the case *Brauneby v. Cokesale*, p. 62, makes one Counsel, Toudeby, say to another, Friskeneby, "Not you by God!" but these words are not in the text. I have examined Maynard's edition in my own library and do not find the words there, either. *Aliquando bonus Homerus dormitat*. But if Toudeby did not say so on that occasion he probably did so on some other. Edition 1678, p. 14.

then a sly drive at each other. Maitland cites one instance—"Bereford is Chief Justice of the Common Pleas; Mulford and Stonor are Justices. Stonor has been taking part in a debate with counsel. Then we read this:

Maitland: Some of you have said a great deal which runs counter to what was hitherto accounted law.

Bereford: Yes! That is very true and I won't say who they are (and some people thought that he meant Stonor.)<sup>32</sup>

Counsel, too, show some pertinacity—not unknown to this day—and the Court becomes impatient. Toudeby, who seems to have been as able as he was prominent, prays Rolls to be searched to show his cause of action. Bereford, J., says: "You ought to tell us the cause of your action and not say simply, 'Look at the rolls.' (*Veez ici les roulees.*) But you will get no more from us. Therefore, say something else." Toudeby persists, but in vain. Bereford breaks out, "You will get no more from us. So say something else if you expect, &c." (*Vous n'avez plus de nous. Par quai dites altre choce si vous quedetz, &c.*)<sup>33</sup>

Counsel indulge in cross-firing occasionally, for 'tis their nature, too—when Herle wants a little more particularity in a declaration, his brother, Passeley, replied, "You must take our words just as we say them." "*Pernetz la auxi com nous le dyoms,*" or "*Pernetz les paroules auxi come nous le dioins.*"<sup>34</sup> On another occasion Toudeby said to the Judge about his client, "He is a poor man who knows no law \* \* \* and he prays you to tell him what estate he ought to have by this writing." Herle retorted, "It is because he knows no law that he has retained you \* \* \*." And Bereford, J., said, "At your peril, what estate do you

<sup>32</sup>Introduction, p. xiii, the reporter's note is "*Et ascuns entendraient q'il dist ceo de Stonore,*" MS. A., f. 173.

<sup>33</sup>Latimer v. Anon, p. 103.

<sup>34</sup>Kyme v. Leake, p. 6. Maynard has it, "*puetz les poules come nous le dioins.*"

claim?"—and Toudeby's associate made his claim without further talk.<sup>35</sup>

Many familiar maxims make their appearance in these reports:

*Nemo est haeres viventis*—almost pecisely if not quite in that form; but as Bereford, J., says, "*Heir ne poetz estre vivaunt vostre peire.*" "*Heir, you cannot be your father living.*"<sup>36</sup> Of two repugnant clauses in a deed the former must prevail, "*La ou deux clauses sount compris dedenz un fait qe sount de divers nature, repugnaunz homme deit plus tost avoir regarde à la primere continue, etc., qe as autres subcequens.*" "*There where two clauses are comprised within one deed which are different and repugnant one should have regard rather to the first therein contained than to the others later.*"<sup>37</sup> A deed is necessary to give a right *in alieno solo*—as a corody or the right to occupy a chamber.<sup>38</sup> This is the basis of the well known much debated and much reprobated case of *Wood v. Leadbetter*, 13 M. & W. 838, which *me judice* has been the cause of much injustice and some bad law. Perhaps the recent cases such as *Hurst v. Pictures Theatres Limited* (1915), 1 K. B. 1, have drawn its teeth and relegated it to innocuous desuetude.

<sup>35</sup>*Brauneby v. Cokesdale*, p. 64.

<sup>36</sup>*Anon.*, p. 10.

<sup>37</sup>*Judgment of the Court in Blaunket v. Simonson*, p. 127. *Elphinstone on Deeds* gives this as Rule 20, p. 91, and quotes, "When there are two clauses in a deed of which the latter is contradictory to the former then the former shall stand as in 2 Ed. 2, feoffments and faits (a)" per Nicholas B. Cother v. Merrick, *Hard.* 94 and says, "The reference (to 2 Ed. 2) is wrong."

The case of *Blaunket v. Simonson* in which the principle is laid down by the Court is reported in Maynard's edition at pp. 26-27, the plaintiff being called *Blaunchet* and the defendant *Symound*.

<sup>38</sup>P. 4, cf. p. 129, says Herle, "I have confessed that the soil it owns and what you claim is a profit *in alieno solo* \* \* \* and you do not show any specialty by which you can use this profit," and *Assheby* has to try another plea.



There are curious holdings in some cases, *e. g.*, the Court declined to enforce a deed made to Berwick "*ou ceste court n'avoit conissaunce*," "where this Court had not cognizance."

But I have said enough to show the great interest this volume has for students of the English law; and I only add that there are volumes published by the Selden Society of even greater interest.

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## FROM STATE TO FEDERAL REFERENDUM.

"The government of the union . . . is emphatically and truly a government of the people. In form and substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit."<sup>1</sup> But, nevertheless, the founders of the Federal Constitution were apprehensive of a government too close to popular control. Accordingly, for the offices of President and Senators "the policy of refining popular appointment by successive filtrations" was adopted. Likewise the people "excluded themselves from any direct or immediate agency" in making amendments to the Federal Constitution, and "directed that amendments should be made representatively for them";<sup>2</sup> and recently, in the cases of *Hawke v. Smith*,<sup>3</sup> it has been finally determined that such exclusion cannot be legally affected through the method of direct legislation provided by the States.

An amendment of 1918 to the Constitution of Ohio expressly provided that "the people . . . reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States"; and there has been question also whether the constitutions of a number of other states should not be construed to include such amendments as subject to the referendum. These constitutional provisions have now been considered in several courts in their relation to Article V of the Federal Constitution, which provides for the participation of the "Legisla-

<sup>1</sup>*McCulloch v. Maryland*, 4 Wheat. 316, 4 Law Ed. 579-601 (1819).

<sup>2</sup>*Dodge v. Woolsey*, 18 How. 331, 15 Law Ed. 401-407 (1856).

<sup>3</sup>252 U. S. ...., 64 Law Ed. .... (1920); 252 U. S. ...., 64 Law Ed. .... (1920). Affirmed in *Rhode Island v. Palmer*; 252 U. S. ...., 64 Law Ed. .... (1920).

THE FIRST CANADIAN WAR-TIME PROHIBITION  
MEASURE

BY

WILLIAM RENWICK RIDDELL.

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## THE FIRST CANADIAN WAR-TIME PROHIBITION MEASURE

WHEN the United States declared war on Great Britain in 1812, many of the farming class in Canada were called to the colours in the militia to defend their country—with the result that the production of grain in the colony was diminished in 1813 and 1814. The scarcity was to a certain extent counterbalanced by the flight to the United States of traitors, a large proportion of whom had come from that place, and also of some American citizens. When in 1813 a portion of the Niagara frontier was taken possession of by the enemy, many of the inhabitants of that district, disaffected to the Crown, joined the American forces, and some of these left crops of grain almost ready for harvesting. John Beverley Robinson,<sup>1</sup> the acting attorney-

<sup>1</sup> Although but just of age, still under articles, and not yet called to the Bar by the Law Society of Upper Canada, John Beverley Robinson was appointed acting Attorney-General of Upper Canada on the death of John Macdonell from wounds received at the Battle of Queenston Heights, October, 1812. He owed this extraordinary promotion to his friend, Mr. Justice Powell, who had been from boyhood a close and intimate friend of the new Administrator, Sir Roger Sheaffe. D'Arcy Boulton, the Solicitor-General, who was entitled to the promotion, was then a prisoner in France. On his return from captivity he became Attorney-General, and Robinson succeeded him as Solicitor-General; when Boulton was elevated to the Bench, Robinson became Attorney-General, and this office he filled until he, too, received promotion and became Chief Justice of Upper Canada. It has not, I think, been noticed that Robinson practised at the Bar for more than two years before he was called to the Bar by the Law Society of Upper Canada. The Law Society Act of 1797 allowed the judges to admit to practice members of the Bar of other British possessions; but prohibited from practice all persons except those so called and those called by the Law Society. In 1812 it had been found impracticable to get together a quorum of the Benchers of the Law Society to call to the Bar those who were entitled. The Court of King's Bench, November 11, 1812, notwithstanding the statute, called upon Dr. William Warren Baldwin, the Treasurer of the Law Society, "being a resident practitioner . . . to produce the Books of the Society and report to the court the names of the students entitled by the time of their admission to be called if there was present a quorum of Benchers and to show cause why they should not respectively be called to the Bar without such presentation." The Books were produced in court, November 14, 1812, and the "following gentlemen were admitted Barristers of this Honourable Court:

general, was directed by the Administrator and Commander of the Forces, General de Rottenburg, to report the facts to Chief Justice Thomas Scott, Chairman of the Committee of the Executive Council; and he did so. The Committee took speedy action. Naturally the General thought the military should take charge, but the Council advised against committing to any military authority the measures proposed, and advised the issue of special commissions to select Justices of the Peace in the Districts in which the lands were situated, "to report cases, make necessary arrangements for the preservation of the grain, to appreciate its value and receive and answer any claims that may arise by reason of the execution of their powers."<sup>1</sup>

While the Committee were all agreed on the steps to be taken, it was recognized that there was no common or statute law which could be applied to effect the desired result; and consequently the Administrator of the Government was recommended to act in his capacity of Commander of the Forces in Upper Canada.<sup>2</sup> He did so; and the several commissioners were instructed that when proof was laid before them of treasonable adhesion to the enemy, the evidence should be preserved and the informants bound over to give testimony to support indictments which it was intended should be laid at the next Court of Oyer and Terminer in the District. These proceedings caused the flight of more traitors, open or veiled, and had some effect in reducing the scarcity of grain. But, of course, the effect was not very marked; another plan much more successful—and to us more interesting—is now to be noted.

Upper Canada until about the middle of the nineteenth century was perhaps the most drunken country in the world; and whiskey made from wheat was the universal beverage. This liquor was much like the *whiskey blanc* of the province of Quebec; it was

Jonas Jones, Esquire, George Ridout, John B. Robinson, Christopher Alexander Hagerman." Of these the first and fourth became justices of the Court of King's Bench, the second Judge of a District Court, and the third Chief Justice of the Province. This proceeding was wholly *ultra vires* and irregular: those thus called afterwards regularized their standing by being called to the Bar by the Law Society in Hilary Term, 1815, when a quorum of Benchers was obtained.

<sup>1</sup> This and other quotations are from the original papers in the Canadian Archives at Ottawa (Sundries, Upper Canada). The quotation is from a letter from Chief Justice Scott to de Rottenburg, from York, July 18, 1813.

<sup>2</sup> See letter from Chief Justice Scott to Edward McMahon, Secretary to the Administrator, July 22, 1813. Sir Roger Hale Sheaffe had been Administrator from October, 1812, until June 18, 1813, when de Rottenburg succeeded him.



raw, fiery, and potent, and had the great recommendation of being very cheap.<sup>1</sup> Distilleries were planted broadcast over the land, and drove a roaring trade; distillers must needs have grain and they offered high prices for it, thereby increasing the price while they reduced the supply for purposes of food. There was also a little exportation of grain from the Eastern District to Lower Canada—not enough, however, to be a real peril.

In the second session of the sixth provincial parliament, called by Sir Roger Hale Sheaffe and sitting from February 25 to March 13, 1813, the matter of saving grain was earnestly discussed; and at length an Act was passed authorizing the person administering the government of the province to prohibit the exportation of grain (and other provisions) and to restrain the distillation of spirituous liquors from grain.<sup>2</sup> The legislation was drastic and, if acted upon, was likely to have an effect which had not been borne in mind by the Administrator and Legislators—it was likely to put an end to distilling altogether, and would thus deprive the troops of their accustomed liquor. No person had yet advanced the proposition that fighting men could get along without alcoholic stimulants, even if some weaklings might be forced, and some hypocrites might pretend to do so. De Rottenburg consulted Robinson,<sup>3</sup> telling him of the absolute necessity of distilling whiskey for the soldiers; but Robinson was obliged to advise that “unfortunately the Legislature have put it out of his power, so that he cannot license any particular person to distil for the Government, neither can he do it indirectly in any particular case by remitting the penalty because half of it belongs to the informer.”

On July 24, 1813, Robinson wrote to the General's secretary

<sup>1</sup> My father, the late Walter Riddell, told me that at the first election after his arrival in Upper Canada, the General Election of 1834, at the polling booth at Gore's Landing, Rice Lake, there stood at the door a barrel of whiskey with the head staved in and a tin dipper for all to help themselves. In the late 50's and the early 60's I myself carried a whiskey bottle round to the men in the harvest field, accompanied by a brother with a pail of water in which oatmeal was mixed. It was in the 50's that the part of the province immediately north of Lake Ontario began to feel the effects of the temperance movement, and Lodges of Sons of Temperance and of Good Templars became numerous, with most beneficial effects upon drinking habits.

<sup>2</sup> The Act is (1813) 53 Geo. III, C. 3 (U.C.). It was temporary, but was renewed for a year by (1814) Geo. III, C. 8 (U.C.), and finally expired March 15, 1815. Another temporary Act prohibiting the sale of spirituous liquor to Indians was passed in 1813, 53 Geo. III, C. 5 (U.C.).

<sup>3</sup> John Beverley Robinson to McMahon, York, July 24, 1813.

that, while he had put up proclamations in all the Districts of the province, it was for the General to consider whether it was advisable to continue the prohibition "or whether the quantity of grain in the country will render it prudent to recall it by a subsequent Proclamation which he has it in his power to issue whenever he pleases. . . . Now not a gallon of whiskey or other spirits can be distilled and it becomes important to consider whether the army have other means of supply."

The suggestion contained in this letter was promptly acted upon; a fresh proclamation was issued withdrawing the prohibition—and the former trouble revived at once. On November 1, 1813, Robinson wrote to General de Rottenburg submitting "the expediency whether the state of the army will *now* allow a general prohibition of the distillation of grain. The demand for whiskey enables distillers in this part of the country [Robinson wrote from Toronto, then called York] to offer from 12 to 15 shillings, New York currency<sup>1</sup> [\$1.30 to \$1.87½] per bushel for wheat, the natural effect of which will be to raise very considerably the price of flour, an indispensable article and of greater consumption. I suppose the same evil exists in other parts of the Province and it would be well if, consequently with the supply of the troops, a remedy could be provided by a total prohibition." A full supply having been laid in for the troops, the General issued a proclamation forbidding until March 1, 1814, the distillation of any grain.

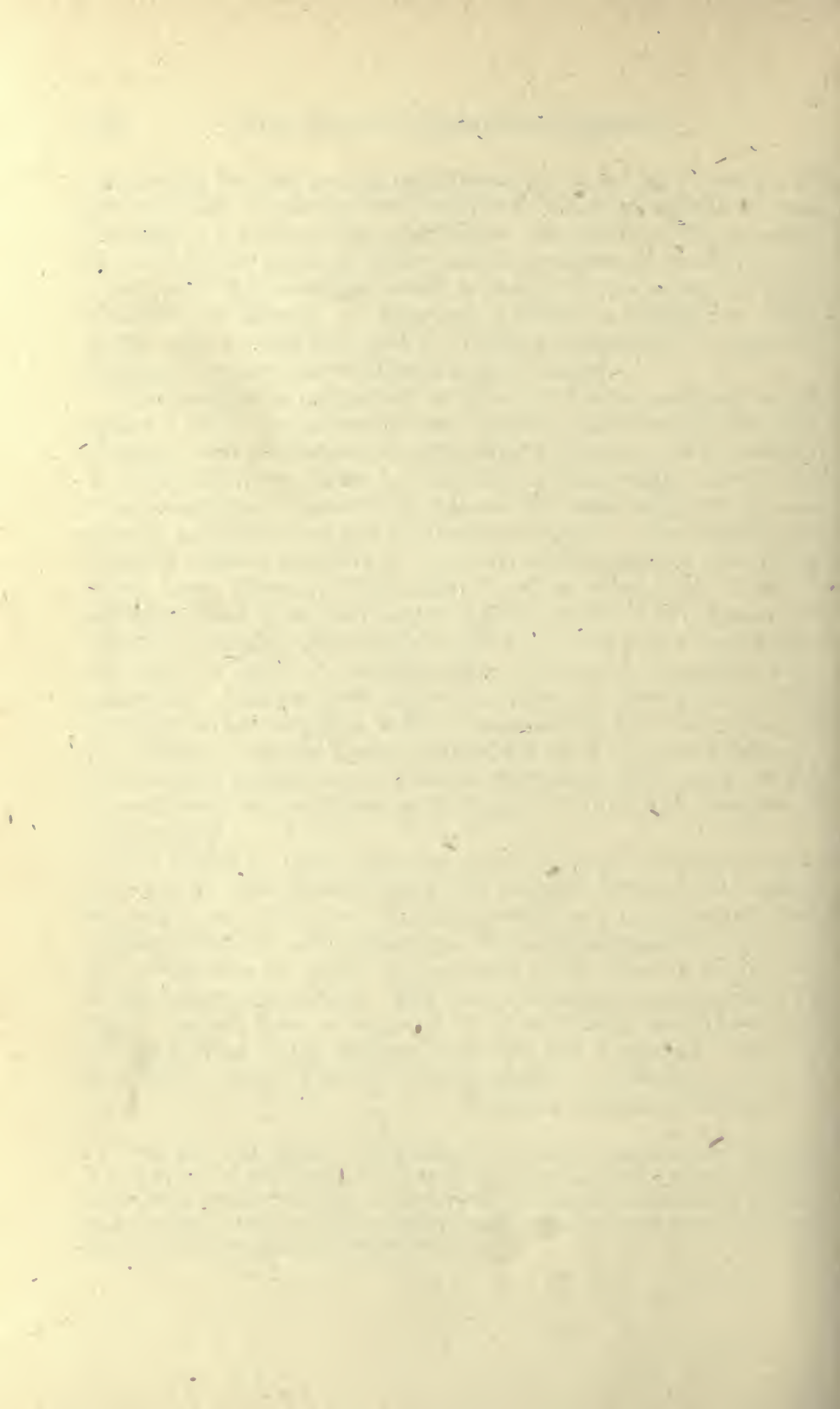
On March 5, 1814, Robinson wrote to Captain Loring, secretary to the new Administrator, Sir Gordon Drummond, calling his attention to the fact that the prohibitory proclamation had expired, March 1, and added that if it were intended to continue the prohibition he should be informed of the time to be limited in the new proclamation. But the prohibition was permitted to lapse, and we hear no more of it: there was no government to be assailed or voted against, and the first Canadian war-time prohibition measure passed into the limbo of oblivion.

WILLIAM RENWICK RIDDELL

<sup>1</sup> The New York shilling. "York shilling" or "Yorker" was 12½ cents, the York pound, \$2.50. In my boyhood near Cobourg the ordinary method of estimating prices was by York shillings: there was no coin for the York shilling, but the English sixpence passed as such. The use of this method of counting began to wane about sixty years ago and has now almost completely disappeared.







PRIVY COUNCIL APPEALS IN EARLY CANADA

BY

WILLIAM RENWICK RIDDELL

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## PRIVY COUNCIL APPEALS IN EARLY CANADA

A MILD flutter has recently been caused in legal and other circles in Ontario by a suggestion that appeals to the Judicial Committee of the Privy Council might well be abolished. It may be interesting to some to know about the practice in regard to such appeals in early British Canada, as well as about the first proposals to abolish them.

After the surrender of Quebec in 1759, and of Montreal in 1760, Canada was governed for some time as a conquered country; the Courts were presided over by military officers who administered law by their own conception of right. This *régime militaire* has been much maligned, but nothing has appeared to indicate aught but good will on the part of the military authorities toward the conquered people and a sincere desire to do justice and right.

When by the Treaty of Paris, concluded in February, 1763, "Canada with all its dependencies" was ceded by His Most Christian Majesty Louis XV to the Most Serene and Most Potent Prince George III, a time limit of eighteen months was fixed for the emigration from Canada of those who desired to retain their former allegiance to France<sup>1</sup>.

Canadians having become British subjects *de jure* by the operation of the treaty, it was of course recognized that civil government must be provided in the place of the existing military government.

The King, by the Royal Proclamation of October 7, 1763, formed a "Government of Quebec" of the territory from the River St. John west to a line drawn from the south end of Lake Nipissing to the point at which the parallel of 45 degrees north latitude crosses the St. Lawrence;<sup>2</sup> and General James Murray was ap-

<sup>1</sup> Shortt and Doughty (eds.), *Documents relating to the Constitutional History of Canada, 1759-1791*, second edition, Ottawa, 1918, pp. 97 sqq.

<sup>2</sup> *Op. cit.*, pp. 163 sqq. The western limit of Quebec was fixed thus far east because it was intended to place the vast territory to the west under a separate administration, for the Indians and others to hunt in, and open to all the British Colonies. The southern boundary was fixed at 45° north latitude because it was intended to divide the territory with the colonies of New York and New England.

pointed governor<sup>1</sup> with carefully drawn commission and instructions. By these instructions he was directed with his Council to erect courts of judicature and to provide that "appeals should be allowed in all Civil Causes from the Courts".<sup>2</sup>

Of course, civil government could not come fully into force until the eighteen months had elapsed, on August 10, 1764; but on September 10, 1764, an Ordinance was passed erecting two courts—one the Court of King's Bench, with full civil and criminal jurisdiction, and the other a Court of Common Pleas, with full civil jurisdiction over £10.<sup>3</sup> From the Court of King's Bench there was an appeal to the Governor and Council in cases above £300 sterling, and thence to the King and Council in cases involving £500 sterling and upwards. From the Court of Common Pleas, there was an appeal to the Court of King's Bench in cases of £20 currency (£18 sterling) and upwards, to the Governor and Council in cases over £300 sterling, and thence in cases of £500 sterling and upwards to the King and Council.

When, in 1768, Sir Guy Carleton became governor, his commission and instructions were much to the same effect; but he was instructed specifically to limit the right to appeal to the King to cases above £500 sterling.<sup>4</sup> There was also a direction that an appeal should be allowed unto "Us in Our Privy Council" "in all cases of Fines imposed for Misdemeanours" amounting to £100 sterling.<sup>5</sup>

There had been a very considerable complaint of the administration of justice, arising in great measure from the uncertainty of the law. The Proclamation of 1763 had purported to introduce the English law in both civil and criminal matters; the Ordinance of September, 1764, had directed the Court of King's Bench to "hear and determine all criminal and civil causes agreeable to the laws of England and to the ordinances of the Province"; the judges of the Court of Common Pleas were to determine agreeable to equity, "having regard nevertheless to the Laws of England as

<sup>1</sup> *Op. cit.*, pp. 173, 181 sqq.

<sup>2</sup> *Op. cit.*, p. 188: Article 17.

<sup>3</sup> *Op. cit.*, pp. 205 sqq. Justices of the peace decided cases up to £30 Quebec currency (£27 sterling). One justice could dispose of cases up to £5, two up to £10, and the Quarter Sessions up to £30, with an appeal to the Court of King's Bench.

<sup>4</sup> *Op. cit.*, pp. 307-8: "the taking or demanding any Duty payable to Us or to any Fee of Office, or Annual Rent, or other such like matter or thing where the Rights in future may be bound" (Article 16).

<sup>5</sup> *Op. cit.*, p. 308: Article 17.



far as the Circumstances and present Situation of Things will admit". In the Court of King's Bench, the chief justice presided, an English barrister who followed the law of England closely; in the Court of Common Pleas were lay judges of little or no legal knowledge, whose views of equity were not fixed. It sometimes happened that the judges of the Court of Common Pleas, deciding on their own ideas of equity, were reversed by the chief justice on the law of England; sometimes he was reversed by the Governor and Council, and an appeal to the Privy Council was not always successful.

In 1767 the Privy Council sent a request to Carleton for information as to the defects in the administration of law, asking for a report from the governor, the chief justice and the attorney-general.<sup>1</sup> Carleton replied showing the defects just mentioned, and added, "The People notwithstanding continue to regulate their transactions by these ancient laws though unknown and unauthorized in the Supreme Court [the Court of King's Bench] where most of these transactions would be declared invalid."<sup>2</sup>

Francis Maseres, the attorney-general, submitted a report for the governor in February, 1769, but it did not recommend itself to Carleton: Maseres recommended *inter alia* that from the courts of the province "there should be an appeal to the Governor and Council of the Province and from thence to Your Majesty in Your Privy Council. One great use of the appeal . . . would be to preserve an uniformity in the law throughout the Province . . . and . . . precedents . . . to determine any subsequent disputes . . . should be ascribed only to those cases which had been decided by the Governor and Council . . . or by your Majesty's Self in Your Privy Council."<sup>3</sup>

The strong agitation for the reintroduction of the former French-Canadian law led to much consideration by the Privy Council and the administration. An order-in-council of June 14, 1771, followed by another of July 31, 1772, directed the British attorney-general, solicitor-general, and advocate-general to report on the communication as to the laws, etc., of Quebec. The report of Thurlow, the attorney-general, and Wedderburn, the solicitor-general, has been lost. Only certain extracts therefrom are now available; and in the parts that are extant nothing is said of the

<sup>1</sup> *Op. cit.*, p. 285.

<sup>2</sup> *Op. cit.*, p. 288; Carleton to Shelburne, December 24, 1767.

<sup>3</sup> *Op. cit.*, pp. 360 sqq.



Privy Council except in general terms. Wedderburn recommends that "in all cases of superior value the Party aggrieved . . . may . . . be at liberty to appeal to His Majesty in Council."<sup>2</sup> The advocate-general, James Marriott, published his report in 1774<sup>1</sup>; in it he says, "That no appeal should be to the King and Council under £500 is thought by some persons a hardship and that it leaves no check upon the Governor and Council in less sums of great value in so poor a colony"; but he expresses no opinion in regard to the matter.

When in 1774, the Quebec Act, 14 George III, c. 83, came to be passed, reintroducing the former French-Canadian law in civil matters, it was silent as to appeals to the Privy Council.<sup>3</sup>

This Act necessitated further legislation in the colony, and the Ordinance of February 25, 1777, was passed at Quebec.<sup>4</sup> A change in the courts was made by this ordinance. A Court of Common Pleas was erected for each of the two districts of Quebec and Montreal with civil jurisdiction; one judge for cases up to £10 sterling and two for other cases. In cases of £10 and upwards and certain special cases an appeal lay to the Governor and Council; in cases over £500 sterling an appeal lay to the King and Council. The Court of King's Bench became a criminal court solely.<sup>5</sup>

The Quebec Act pleased the French Canadians in most respects, and it angered most of the English Canadians in equal measure. Agitation was met by counter-agitation, complaint by counter-complaint. The English as a rule desired the reintroduction of the English civil law, the French opposed it.

William Dummer Powell, afterwards chief justice of Upper Canada, who was then practising in Montreal, was one of the leaders of the English faction. Many reforms were desired and urged by this faction, and at length in 1783 Powell, with his two French-Canadian colleagues, Adhémar and De Lisle, went to England with a petition. In this petition, as in a similar petition in 1784, there was contained a request "That appeals from the Courts of Justice in this Province to the Crown be made to a Board of Council or Court of Appeals composed of the Right Honourable the Lord Chancellor and the Judges of the Courts of

<sup>1</sup>*Op. cit.*, p. 436.

<sup>2</sup>*Op. cit.*, pp. 445 sqq.

<sup>3</sup>*Op. cit.*, pp. 576 sqq.

<sup>4</sup>*Op. cit.*, pp. 679 sqq.; 17 Geo. III, cc. 1, 2.

<sup>5</sup>*Op. cit.* pp. 690-691.

Westminster Hall."<sup>1</sup> This was plainly intended to cause cases from the province to be decided as far as possible by the laws of England. The French Canadians were not blind to this object. They held meetings to discuss the matter, and they represented "That up to the present time we have made appeals to the King and Council who have taken our laws as the guide of their decisions. But what will become of our rights when brought before a Court which will deviate in nothing from the British Laws and Constitution?"<sup>2</sup>

The Ordinance of Quebec of 1787, 27 George III, c. 4, continued the right to appeal to the King and Council<sup>3</sup>, and when the matter came to be dealt with by the Home authorities, the request in the petition was dealt with summarily: "The 13th Article desires a Court of Appeal from the Judicature of the Province to be composed of the Lord Chancellor and the 12 Judges. This Article appears to cast a reflection wholly unmerited on the decisions of the Privy Council, and the proposal is certainly incompatible with the other duties of the persons named."<sup>4</sup>

The Canada or Constitutional Act of 1791, 31 Geo. III, c. 31, is silent as to such appeals, and there is no record of any further objection to the appellate jurisdiction of the Privy Council until a comparatively modern day.

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<sup>1</sup>*Op. cit.*, pp. 742 sqq.; especially p. 745: Article 13.

<sup>2</sup>*Op. cit.*, pp. 754 sqq.

<sup>3</sup>*Op. cit.*, pp. 858 sqq.; especially p. 859.

<sup>4</sup>*Op. cit.*, p. 982.





THE LAW OF MARRIAGE IN UPPER CANADA

BY

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## THE LAW OF MARRIAGE IN UPPER CANADA

UPPER CANADA was created a separate provincial entity by the proclamation of General Alured Clarke dated November 18, 1791, and becoming effective December 26, 1791.

The territory which thus became Upper Canada had been part of the province of Quebec formed by the Quebec Act of 1774, and a small part along the Ottawa had been part of the original "Government" of Quebec formed by the Royal Proclamation of 1763. That proclamation had introduced the English law, civil and criminal, into Canada; but the Quebec Act of 1774 had re-introduced the former "law of Canada" as to property and civil rights, leaving the criminal law as it was. Consequently, when Upper Canada began her provincial career, she was under the French-Canadian civil law and the English criminal law.

The French-Canadian civil law followed the canon law and required the presence of a priest episcopally ordained to make a marriage valid.<sup>1</sup>

At the first parliament of the young province at Newark in 1792, the first statute passed<sup>2</sup> introduced the English civil law; and thereupon the presence of a Church of England clergyman, priest or deacon, became necessary to make a marriage ceremony valid.

Before this time it had been taken for granted that, at least in the wild parts of the country, a Church of England clergyman might validly perform the ceremony<sup>3</sup>; and there were some marriages before the chaplains of the military posts. In the absence of a chaplain, those seeking to be married applied to the commanding officer of the military posts, to magistrates, to adjutants, and even to surgeons at the posts. These, acting as chaplains, performed the ceremony. Some of those so married took care on their return to civilization to have the ceremony regularly performed;<sup>4</sup> some, however, omitted this wise precaution. Some were married by justices of the peace: these marriages were equally invalid. The Hon. Richard Cartwright, who had been appointed a member of the Legislative Council,



was strongly impressed with the peril attached to these irregular marriages (his own was one of them); and he in the first session of the first parliament, in 1792, introduced a bill to validate all such marriages, the first bill introduced in an Upper Canada parliament. This bill was said by Simcoe to be a "hasty and ill-digested Bill",<sup>5</sup> and it was withdrawn after its first reading on the express promise of the lieutenant-governor that the matter should receive the attention of the Home authorities.

Chief Justice Osgoode, upon the instructions of Simcoe, drew up a bill for the purpose, and this was sent by Simcoe to Dundas, one of the secretaries of state, for submission to the law officers of the Crown.<sup>6</sup>

The bill was submitted to the advocate-general, William Scott (afterwards Lord Stowell), to the attorney-general, John Scott (his brother, afterwards Lord Eldon), and to the solicitor-general, John Mitford (afterwards Lord Redesdale); and they reported favourably to the bill. This report was sent by John King, permanent under-secretary of state for the Home Department, to Simcoe.<sup>7</sup> Before the bill and opinions had been received or even despatched, however, the provincial parliament had met on May 31, 1793. The first bill to be introduced was the Marriage Bill: this was introduced by Cartwright on June 3, when it was read for the first time. It rapidly reached the second reading and the committee of the whole, and was passed on June 14, on which day it was sent down to the House of Assembly.<sup>8</sup> There it was amended so as to authorize the ministers of communions other than the Anglican to perform the marriage ceremony for their own people; and in this form it was returned to the Council on June 20.

The amendment was not accepted by the Council; but a conference was held by Cartwright, Peter Russell (afterwards administrator of the government of Upper Canada), and Commodore Grant, representing the Council, and Macomb, Campbell, and Van Alstine representing the Assembly,<sup>9</sup> and the commoners withdrew the amendment on the positive assurance that representations would be made to the Home government in favour of non-Anglicans, and that the matter would be put on a liberal footing at the following session.<sup>10</sup>

The Act was passed and became law<sup>11</sup>; it provided that all marriages theretofore contracted before any magistrate, or commanding officer of a post, or surgeon of a regiment acting as chaplain, or any other person in any public office or employment,

should be valid. Persons who had contracted such marriages might preserve testimony by making within three years an affidavit in the form given, with the dates of the births of their surviving children, if any, and these affidavits the Clerk of the Peace was to enter and record in a register to be kept by him for the purpose. For the future, until there should be at least five "parsons or ministers of the Church of England" in any District—there were then four Districts in Upper Canada<sup>12</sup>—a magistrate might marry after having put up a notice in the most public place of the township or parish and having waited until three Sundays had elapsed.

It is probable that advantage was taken of this Act in validating marriages in all or most of the Districts; but, so far as I know, the records of only one District show any trace of this—and that only by accident.

The clerk of the peace of the Midland District at Kingston, in 1813, wanted a book in which to keep the records of the Court of General Quarter Sessions of the Peace in and for the Midland District, and took for the purpose the blank leaves of an old register no longer in use. There were only four entries in the register; they run as follows: David McCrae swears before Richard Cartwright, Junior, Judge of the Court of Common Pleas for the Midland District, May 29, 1794, that he did publicly intermarry with Erie Smith at Michilimackinac, on October 13, 1783, and he names, with the date of their births, his living son William, and three daughters, Sophia, Frances, and Amelia. Erie Smyth (signing her name in that way) swears to the same facts before George McBeath, Justice of the Peace at L'Assumption (now Sandwich) on June 18, 1794. Then "Richard Cartwright, junior, of Kingston, Esquire", swears before Thomas Markland, Justice of the Peace, on May 30, 1794, at Kingston, that he did publicly intermarry with Magdalen Secord at Niagara "on or about" October 19, 1784, and he names his living children James, Richard, and Hannah; and Magdalen Cartwright swears the same at the same time. In each case, it will be noted, the marriage had taken place at a British military post.<sup>13</sup>

Simcoe did not like the Act. He loved and honoured his church only less (if less) than his king; he desired the establishment of the Church of England, and was indignant that it should be even suggested that ministers of another church should have the power to marry. Although Dundas, the secretary of state, wrote him approving of the allowance of the Act and adding



that the opinions of the imperial law officers would enable him to make the necessary amendments next session,<sup>14</sup> he took no steps to carry out the agreement made between the Houses. Hamilton did not introduce a bill as had been arranged, and thus nothing was done.

The reason for this inaction is given in Simcoe's despatches and I cannot do better than copy his memorandum on the subject, contained in an official letter to Dundas from Navy Hall, dated August 2, 1794:

It has already been suggested in the observation on the Marriage Act that it was suffered to pass on a compromise between the two Houses upon an implied agreement between a majority of each that the power of legally solemnizing marriages should be extended to the spiritual pastors of several sects and denominations of religion. The opinion of the Law Officers of the Crown did not arrive here until after the Act had passed. It was proposed during the Session to have brought forward an amending Bill containing the provisions suggested to them, but on the first day of the meeting of the House petitions from Menonists, Tunkers, and others were brought forward praying that their ministers might be authorized to solemnize marriage with validity. The petition was disregarded, but it was found that had the question been stirred in any respect whatever the various pretensions and prejudices of the different sectaries would have produced great animosity and confusion; it was, therefore, thought that it was most advisable to suspend all proceedings on the subject till it should be known whether it was thought expedient that the power requested should be extended to the ministers of any other religious description in order that opinion might be sounded and previous measures be taken to effectuate if possible what may be thought most beneficial for the Province in such behalf.<sup>15</sup>

A poor excuse is better than none.

In the following year (1795) a petition was presented by the Presbyterians, but no action was taken looking toward relief.<sup>16</sup>

In 1796 the Baptists of Bastard Township sent a petition to Simcoe praying that "regularly ordained elders of any Baptist Churches in this Province shall be fully empowered to administer the Ordinance of Marriage".<sup>17</sup> We have no record of Simcoe's answer, but it was certainly not favourable.

The Presbyterians of the county of Grenville renewed their application, setting out that their Church had the right in Scotland to celebrate marriages, and urging that they should have the



same right in Upper Canada. Simcoe said to them in the most decisive terms that "the petition was a product of a wicked head and most disloyal heart", and they took nothing by their motion.<sup>18</sup>

Simcoe left the province in July, 1796, never to return; and it was only when he had gone that there dawned any hope of a relaxation of the law.

This seems to be a proper place to mention a somewhat curious claim made by a clergyman of the Church of England.

From the beginning of the British rule in Canada the granting of marriage licences was reserved to the governor; *e.g.*, in the Instructions to General James Murray, November 14, 1763, he was directed (section 37) to give all countenance and encouragement to the exercise of the ecclesiastical jurisdiction of the Lord Bishop of London in the Province "excepting only the collating to Benefices, granting Licenses for Marriage and Probate of Wills which We have reserved to you Our Governor".

In the instructions to Dorchester, September 16, 1791, which were also those to Simcoe, while the Right Reverend Charles Inglis, Bishop of Nova Scotia, was to have ecclesiastical jurisdiction, there was reserved to the governor "the granting of Licenses for Marriage, Letters of Administration and Probates of Wills" (section 45).

The Bishop of Nova Scotia made the Reverend John Stuart of Kingston his commissary; and Stuart claimed the right as such to issue marriage licences in Upper Canada. This right was denied by the Executive Council, September 29, 1792,<sup>19</sup> and the claim does not seem to have been renewed.

A royal mandamus for letters patent investing Jacob Mountain with the "Title, Style, Dignity and Honour of Lord Bishop of Quebec", was granted on July 17, 1798; and at the same time John Stuart was made commissary of the Lord Bishop of Quebec. In that capacity he claimed the right to grant to the ministers of churches dissenting from the Church of England licenses to solemnize marriage. The matter was referred by Simcoe in June, 1796, to John White, the attorney-general, whose opinion was that it depended on the terms of the commission of the bishop.<sup>20</sup> A copy of the mandamus was obtained (which the commission should follow to be valid), and it appeared plain that no such power was given.<sup>21</sup>

It was, however, not necessary to make any formal decision; for the legislature took action in the session of 1797. The record

of the proceedings of the legislature in this year is lost, and we derive all the available information from the official reports to the Home Secretary and from the statute itself. Chief Justice Elmsley,<sup>22</sup> in giving the reasons for the Marriage Act of 1797, says:

This Province is principally settled by Loyalists from the Eastern and Middle Colonies who notwithstanding their uniform and steady attachment to the British Constitution retain all those varieties of opinion in religious matters for which that part of America has always been remarkable. It is perhaps not too much to say that the members of the Church of England do not compose more than a fiftieth part of the population of this Province. To have extended the indulgence given by the Act to the ministers—if that term can with any propriety be applied to the self-constituted guides of the various divisions and sub-divisions of sects which agree in hardly any other point but their refusal to conform to the Established Religion of the Province—would have been to give the power of performing the ceremony of marriage to some of the weakest, the most ignorant, and in some instances the most depraved of mankind. Care was therefore taken to confine the relief given by the Act to such of the Protestant Dissenters as, though Non-conformists here, are members of an establishment elsewhere and would for that reason bring with them their sober and regulated modes of thinking both in political and religious subjects which are the usual consequences of habitual conformity to an established ritual which form perhaps the best barrier against the encroachment of either infidelity or fanaticism and, the inseparable companion of each, sedition. For these reasons it was confined to members of the Church of Scotland of which country a very considerable proportion of the settlers in the lower parts of the Eastern District are natives, and to the Lutherans and Calvinists under which descriptions it was presumed almost all the Loyalists who were of either German or English descent and who felt a pride in adhering to the belief of their ancestors would be included.<sup>23</sup>

The Act was reserved by the Administrator, Peter Russell, for the royal pleasure; and it came into force December 29, 1798.<sup>24</sup> This Act gave to "the minister or clergyman of any congregation or religious community of persons professing to be members of the Church of Scotland or Lutherans or Calvinists who shall be authorized in manner hereafter directed to celebrate the ceremony of matrimony between any two persons one of whom shall have been a member of such congregation or religious community at least six months before the said marriage". The minister must



have been ordained according to the rites of his religious community and have appeared before the quarter sessions of the District in which he lived with at least seven "respectable persons", members of his congregation, who should declare him to be their minister; he must take the oath of allegiance; and then the majority of the justices, if they thought it expedient and proper, could give him a certificate authorizing him to celebrate matrimony in that District. Banns for three Sundays or a licence from the lieutenant-governor was necessary; and a certificate of marriage was to be given which might be registered in the office of the clerk of the peace.

It will be seen that all Presbyterian ministers came within the Act: the "Disruption" of the Church of Scotland did not occur until much later.<sup>25</sup> Under the head of Lutherans came the Palatines and a few other Germans (chiefly from the valleys of the Hudson and the Mohawk), while the term Calvinist covered Baptists,<sup>26</sup> and the "Dutch Reformed" also came within this category.

One ever increasing important religious body was excluded—the Methodists. This was deliberate and intentional. The Methodist ministers were, so far, wholly from the United States and were suspected of republican sentiments. There can be no doubt that while these missionaries were devoted to the work of evangelization, and in the main abstained from open attack upon the institutions of the country, they were not all wise at all times,<sup>27</sup> and very little was needed in that generation to rouse suspicion against an American. The Revolutionary War was just over with its legacy of hate and enmity; and while the loyalty of the Canadian Methodist was beyond dispute, the same could not always be said of the American minister.

The provision requiring the oath of allegiance was aimed at ministers from the United States, and that requiring a licence from the Quarter Sessions was to prevent anyone performing the marriage ceremony without legal qualifications.<sup>28</sup>

The last section of the Act deserves attention. It legalized all marriages celebrated after the passing of the Marriage Act of 1793, by any person who should obtain the certificate from the Quarter Sessions between persons either of whom was a member of his congregation. This was to validate marriages celebrated in his own flock by the Reverend John Bethune who had insisted upon the right so to do.<sup>29</sup>

No further legislative action was taken for some years.<sup>30</sup> A



petition from Darius Dunham and a hundred and nineteen others, "Members of a Methodist Society praying that by a Parliamentary provision the same toleration be extended to them as to other sects in this Province, so as to give validity in law to their marriages", was read in the House of Assembly, June 27, 1799, but leave was refused to bring in a bill to that effect.<sup>31</sup>

A new House was elected in 1800, and at its second session, on June 11, 1802, three petitions were presented "from the Society of people called Methodists", setting out their loyalty and adhesion to the British Crown and asking that "an Act may be passed in our favour giving authority to our Preachers (most of whom are Missionaries from the States) to solemnize the religious rites of marriage as well as to confirm all past marriages performed by them". A bill was introduced; the three months' hoist was voted down, and the bill was passed. It was then brought to the Council, where it was "read a first time and ordered to lie upon the table", and was not again heard of.<sup>32</sup>

The fourth parliament was elected in 1804; at its second session, on February 8, 1806, another petition from "the Religious Community called Methodists" was presented to the House for "an Act . . . giving authority to our preachers most of whom are missionaries from the States and a number more who are resident in this Province regularly ordained to solemnize the religious rites of matrimony as well as to confirm past marriages performed by them".

A bill was introduced and passed the lower house without a division; it passed the second reading in the Council; but in the committee of the whole it received the three months' hoist.<sup>33</sup>

In the session of 1807 a similar bill passed the House, but failed to be read the second time in the Council.<sup>34</sup>

In 1808 a bill promoted by the solicitor-general, D'Arcy Boulton, for the same purpose passed the House; the Council made an amendment by striking out the clauses validating previous irregular marriages on the ground that this would encourage irregularities in the future; the Assembly asked for a conference; each House insisted on its position; and the bill was lost.<sup>35</sup>

The sixth parliament was elected in 1812, but nothing was done in the way of amending the marriage laws until its last session in 1816. As usual, a bill passed the Assembly, but was lost in the Council.<sup>36</sup>

The delay in bringing forward this bill was due to the fact that the province was occupied with the War of 1812-15. While the

war displayed the Methodists as a whole in a favourable light, a few of their men of leading proved disloyal,<sup>37</sup> but most of the American ministers remained in Canada, and they were not found preaching or teaching sedition.

Notwithstanding the general loyalty of the Methodists, the English Wesleyan body thought fit to send some of their own missionaries into the province, as the Upper Canadian Methodists were still under the jurisdiction of the Methodist Episcopal Church in the United States, and most of their preachers and leaders came from that country.<sup>38</sup> These English missionaries continued their work from 1816 till 1821, when their Church in England determined to withdraw them (except one at Kingston, where troops were stationed) as there was "no evidence of their American brethren interfering in political questions", and since they "generally remained in the Province during the late war".<sup>39</sup> The English Wesleyans were always held in great favour by the governing classes at York; they never claimed the right of celebrating marriages, but this did not tend to increase the favour of the Legislative Council toward the Methodist Episcopalists.

The seventh parliament was elected in 1816; in its second session (1818) a bill passed the Assembly, but failed in the Council.<sup>40</sup>

In the following sessions (1818) a much more modest bill passed the Assembly, and the Council concurred in it. This Act simply extended for three years from November 28, 1818, the time for those who had neglected to take the steps allowed by the Act of 1793 for preserving the testimony of their marriage validated by that Act, to make an affidavit and record it with the Clerk of the Peace.<sup>41</sup> Nothing was done in the matter in the session of 1819, but in the following session (1820) a bill passed the Assembly. The same day, however, as it had its third reading, Sir Peregrine Maitland prorogued parliament in anger, and it never reached the Council.<sup>42</sup>

The eighth parliament was elected in 1820. At the first session (1821) a government bill, introduced by the attorney-general, John Beverley Robinson, was passed.<sup>43</sup> This was not intended to relax the rules for valid marriages, but to make more certain punishment for unauthorized celebration of the marriage ceremony. I therefore pass it over for the time being without saying more than that it made it a misdemeanour (punishable by fine and imprisonment, not by banishment) for a justice of the peace or any unauthorized person to celebrate marriage. The Act thus



restricted rather than enlarged the right. But, during this session, there were two other bills which passed the Assembly and failed in the Council. The former was introduced by James Gordon of Amherstburg, member for Kent, and was intended only to confirm marriages theretofore publicly contracted in the province "before any Justice of the Peace, Magistrate or Commanding Officer of a Post or before any Minister or Clergyman whatsoever anterior to the passing of" the Act.<sup>44</sup> The other went much further; it was introduced by Robert Nichol of Stamford, member for Norfolk, who had been exceedingly active in promoting such bills in previous years.<sup>45</sup> It was along familiar lines providing for the future as well as the past.

There was no division on either of the latter named bills; that of the attorney-general passed by a vote of 19 to 14.<sup>46</sup>

In the second session (1821), a petition was presented by the Methodist Episcopal Church and "their friends within this Province" through Samuel Casey of Adolphustown, member for Lennox and Addington, praying that "the privilege of celebrating matrimony should not be withheld from ordained Ministers of the Methodist Connection". By a vote of 21 to 11, the government party voting in the negative, a special committee of three was named to take the petition into consideration and report by bill or otherwise. Twelve other petitions of the same tenor were presented, and a bill was brought in by Samuel Casey from the special committee. The bill passed by a vote of 21 to 11 and was sent to the Council. It there received the three months' hoist.<sup>47</sup>

In the session of 1823, Casey renewed his attack. His bill passed the Assembly after a division of 20 to 6; it then went to the Legislative Council, and returned from the Council emasculated. The Assembly bill proposed to give legal validity to all marriage ceremonies performed or to be performed by "any Minister, Priest, Ecclesiastic or Teacher according to any Religious form or mode of Worship", the amendment made by the Council struck out the words following "any", and inserted "Resident Minister or Clergyman legally authorized to celebrate Matrimony", thus leaving matters as they were. A motion in the House to accept the amendment was lost on a vote of 11 to 6, and the parliament being prorogued about ten days later, the bill failed.<sup>48</sup>

In the next session, a petition was presented to the House "of the Members and Friends of the Wesleyan Methodist Epis-



copal Church of this Province" praying for the privilege of solemnizing marriage to be allowed to "the Ministers of that denomination"; also one by David Brackenridge and others "praying that the privilege of solemnizing marriages in this Province may be extended to the Ministers of His Majesty's Methodist subjects". A third petition to the same effect was presented from Thomas Dalton Casey, who obtained leave on a division of 15 to 11 to bring in a bill which passed the first and second readings. On a motion to recommit before the third reading, the three months' hoist was defeated by a vote of 17 to 6, and the bill was recommitted. This was to give the same privilege to the ministers of the Wesleyan Methodists as those given in the bill as originally framed to the Methodist Episcopal. The bill was duly passed, and sent up to the Legislative Council under the title "An Act to authorize Ministers of the Society of Methodists to solemnize marriage in this Province"; here it failed on the second reading.

Another bill to confirm irregular marriages also passed the House. It received its second reading in the Council, went into the committee of the whole, and was not again heard of.<sup>49</sup>

The ninth parliament was elected in 1824. The election had been run on almost purely ecclesiastical issues. The Clergy Reserves, a very large quantity of land reserved for the support of Protestant clergy, had been claimed for the Church of England alone by the governors, the governing classes, and the High Church section of the Church of England. A motion of Robert Nichol in 1817 to sell half of these lands and devote the proceeds to secular purposes had failed by Gore's sudden dissolution of parliament.<sup>50</sup> In 1819, the Presbyterians of Niagara applied for government aid; Maitland obtained the opinion of the law officers of the Crown whether Presbyterians could legally share in the Clergy Reserves; the local attorney-general and solicitor-general thought not, but the law officers in England gave an official opinion that the Church of Scotland could share.<sup>51</sup> But this opinion had no effect; the High Church party successfully resisted the claim of the Church of Scotland, and asserted the exclusive right of their own Church. In the election of 1824, the main battle-ground was the Clergy Reserve question, and in this the Presbyterian and the Methodist Episcopal Church were on the same, as it turned out the successful, side. Heretofore, while it could not be said that the Methodists were the sole demandants of relaxation of the law of marriage, they were by far the most numerous, active and

powerful. After 1824 some at least of the Presbyterians joined hands with them in the endeavour to liberalize the law in respect of marriage.

In the short first session of this parliament no step was taken in the matter of marriage. The House was much taken up with election petitions, and the popular party was somewhat disorganized or rather unorganized. But in the session of 1826, the well-known Marshall Spring Bidwell introduced a bill along the familiar lines, which was carried *nem. con.* in the House. Amendments were then made in the Legislative Council, which purported (1) to repeal the Statute of 1793; (2) to enable "the minister or clergyman of any congregation of persons professing to be members of the Church of Scotland, Lutherans, Congregationalists, Baptists, Methodists, Quakers, Menonists, Tunkers or Moravians" with a proper certificate by the Quarter Sessions of his due ordination, to celebrate matrimony between two persons, one of whom had been a member of his congregation for at least six months; and (3) to validate marriages theretofore celebrated by any duly ordained minister of such congregation or by any one who should receive such a certificate from the Quarter Sessions. In the Assembly, the amendments were ordered to be read by a vote of 28 to 4, but for some reason they were not again mentioned,<sup>52</sup> and the bill failed.

In the session of 1826-7 Bidwell and Peter Perry introduced the same bill, and it passed without opposition. In the Council it was referred to a special committee who reported, whereupon it was referred back to the special committee to prepare amendments, and that was the end of it.<sup>53</sup>

In the session of 1828, Perry and Bidwell brought in a bill in the House which on a division of 23 to 1 was reported by the committee of the whole; a motion to re-commit was lost on a division of 14 to 11, but the bill was subsequently recommitted and passed. It was sent up to the Council; the Council delaying, a message was directed by a vote of 20 to 7 to be sent by the Assembly "respectfully reminding that Honourable House of the Bill passed during this present Session by this House entitled 'An Act to make valid certain marriages heretofore contracted and to provide for the future solemnization of matrimony in this Province' and to recommend that bill as of great importance to the consideration of the Honourable the Legislative Council". To this message the Council courteously replied through their Speaker, Chief Justice Campbell, "that if the House of Assembly had con-



formed to the uniform practice of the House of Commons by appointing a Committee to search the Journals of the Legislative Council they would have discovered that the Bill alluded to was in progress and therefore that there was no reason for departing from the usual course". The Council did not depart "from the usual course", and the bill was never heard of again.<sup>54</sup>

The tenth parliament was elected in August, 1828. The same issue was much in controversy as in the former election, and the temper of the people was getting dangerous. William Lyon Mackenzie made his first appearance in the House as a member, being elected with Jesse Ketchum for the county of York; Marshall Spring Bidwell was elected Speaker on January 8, 1829; and Peter Perry gave notice the next day that he would move for leave to bring in a bill to validate past and provide for future marriages; he obtained leave, and the bill was introduced and passed. The Legislative Council made unimportant amendments which were accepted by the Assembly. The lieutenant-governor, Sir John Colborne, was then pleased to reserve the bill "for the signification of His Majesty's pleasure"<sup>55</sup> on March 20, 1829.

Colborne was a first-rate soldier and believed in rigid discipline in Church and State; he detested the Methodists and thought he had a right to do so on patriotic grounds. He wrote Robert William Hay, permanent under-secretary of state for the colonies, that "the Methodist preachers who are all from the United States are charged with undermining the loyalty of the people but their hostility is directed against the established church . . ."; and he thought the supineness of the Church lamentable. Many of the missionaries would be fit for a quiet country parish in England, but could not "stand against the Methodists".<sup>56</sup> He even wanted English Methodist missionaries sent to the Indians, lest the books of the American Methodists should create a prejudice.<sup>57</sup>

A reply not having been received from the House administration, the Assembly moved promptly. On the first day and first hour of the session of 1829, Perry moved for leave to bring in a bill on familiar lines, and to dispense with the forty-first rule of the House so far as it related to the bill. This was carried.<sup>58</sup> The next day the bill was passed, and sent up to the Council by the hands of Perry and Paul Peterson of Prince Edward. The Council asked a conference on the subject-matter, appointing Wells and Markland conferees for that chamber, and the House agreed,



appointing Peter Perry of Lennox and Addington, Robert Randall of Lincoln, John David Smith of Durham, and George Brouse of Dundas, conferees for that chamber.<sup>59</sup> The Council conferees were instructed to represent that the bill was the same in all respects as that of the previous year, that the pleasure of His Majesty on the former bill had not been declared, that the former bill was still under consideration, and that the Council thought it inexpedient to press the matter upon the Home government "until the expiration of the constitutional period within which the Royal pleasure can be signified". The Council conferees delivered their instructions to the House conferees, and there was nothing more to be done.

When the eleventh parliament met for its first session in 1831, the personnel was different and the feeling not quite the same. On the first day, the attorney-general, Henry John Boulton, gave notice that he would move for leave to bring in a bill to enable the ministers of all religious denominations to celebrate the ceremony of marriage between persons of their respective denominations; a motion by Marshall Spring Bidwell to place the bill in the hands of Boulton and Perry failed by a vote of 12 to 27. The vote cannot fairly be said to have been on party lines but the extreme Reformers, including William Lyon Mackenzie, voted for the motion. On a later division, the solicitor-general, Christopher Alexander Hagerman, voted alone against 40 on an immaterial amendment, and the amendment of Bartholomew Crannell Beardsley of Lincoln, supported by Perry, legitimatizing the children of irregular marriages even if the parties had not co-habited as husband and wife was lost by a vote of 32 to 12. The bill then passed by 44 to 2, Hagerman and John Brown of Durham voting in the negative. The bill went to the Council on February 10, 1831, and received its second reading. It was in special committee when Colborne, on March 2, sent a message to the Council and the Assembly that the bill of 1829 had been approved by the King, and was accordingly finally enacted.<sup>60</sup>

This Act, while passed in 1829, is always cited as of 1830, 11 Geo. IV, cap. 36. Its provisions were liberal: all marriages theretofore publicly contracted in the province before any justice of the peace or any minister or clergyman were validated; means were provided for preserving evidence of such marriages similar to those in the Act of 1793; clergymen of any church or congregation "professing to be members of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Independents, Methodists,

Menonists, Tunkers or Moravians" were authorized to "solemnize the ceremony of marriage within this Province between any two persons" on obtaining a certificate from the Court of Quarter Sessions of their District. To obtain such certificate, they must appear before the Court, take the oath of allegiance, and prove that they were regularly ordained. Banns or licences were necessary, and proper returns were to be made under severe penalties. Substantially, all real grievances were removed by this Act, but the sentimental one remained that clergymen of the Church of England were not required to take out a certificate from the Quarter Sessions, while all other clergymen and ministers were, and there were a few denominations not included. In 1859, the Act 20 Vict. c. 66 (Can.), reciting that under the existing laws "privileges are claimed with regard to the solemnization of matrimony by the clergymen and ministers of certain denominations which are partial in their character and offensive to certain other denominations and their Clergymen and Ministers", provided that

From and after the passing of this Act, the Ministers and Clergymen of every religious denomination in Upper Canada, duly ordained or appointed according to the rites and ceremonies of the Churches or denominations to which they shall respectively belong, and resident in Upper Canada, shall have the right to solemnize the ceremony of Matrimony, according to the rites, ceremonies and usages of such Churches and Denominations respectively, by virtue of such ordination or appointment.

In 1896, by the Ontario Act 59 Vict., c. 39, an elder evangelist or missionary of the "Congregation of God" or "of Christ", *i.e.*, "Disciples of Christ", was authorized as well as a commissioner or staff officer of the Salvation Army. Quakers are specially provided for.

It is not only Christian ministers who have this privilege; it extends to every "church and religious denomination". As is said by Chief Justice Armour: "The statute should receive a wide construction, it does not say 'Christian' but 'religious'. If it said 'Christian', it would exclude Jews. The fundamental law of the Province makes no distinction between churches or denominations; everyone is at liberty to worship his Maker in the way he pleases." Consequently a duly ordained priest of "the Reorganized Church of Jesus Christ of Latter Day Saints" can validly marry.<sup>61</sup> But one cannot yet get up a little church of his



own and thereby obtain the power of celebrating marriage; there must be something of a denomination.<sup>62</sup>

WILLIAM RENWICK RIDDELL

#### NOTES

<sup>1</sup> This was the law in England until after the Reformation; then the presence of either priest or deacon ordained by a Church of England bishop became sufficient. It is unnecessary to consider whether a Church of England clergyman could legally perform the marriage ceremony in Upper Canada before the legislation of 1792. Those who would know more of the law of England should read *R v Millis* (1844) 10 Cl. & F. 334; *Beamish v Beamish* (1859-1861) 9 H.L.Cas. 274.

<sup>2</sup> (1792) 32 George III c. 1, s. 3 (U.C.).

<sup>3</sup> "There is little doubt that in a heathen land, marriage between British subjects may lawfully be celebrated by a clergyman of the Church of England either on board ship or on shore" (*Hammick, Law of Marriage*, London, 1887, p. 266). I do not discuss this question.

<sup>4</sup> For example, Captain James Hamilton, whose descendants are still living in Canada, was married at Michilimackinac to Louisa Mitchell, daughter of Dr. David Mitchell, surgeon-general to the Indian Department at that post. On their arrival at Niagara, they found there the Rev. Robert Addison, a clergyman of the Church of England, and were remarried by him. The register (which was Mr. Addison's own but became that of St. Mark's Church) reads, "August 24th, 1792, Captain James Hamilton to Louisa Mitchell his wife. They had been married by some commanding officer or magistrate and thought it more decent to have the office repeated." The marriage ceremony at Michilimackinac has been said by various writers to have been performed by the bride's father, who was afterwards for many years a resident of Penetanguishene. This mistake arose from a statement made in the diary of Captain T. G. Anderson, published by the Wisconsin Historical Society. The entry in the book of records for Michilimackinac shows that the ceremony was performed on November 5, 1795, by Captain Edward Charleton, who was in command of the post at that time.

<sup>5</sup> Can. Arch., Q. 279, 1, 79. Simcoe to Dundas, November 4, 1792

<sup>6</sup> Can. Arch., Q. 271, 1, 169. Simcoe to Dundas, November 6, 1792. With the bill was sent a careful report by Cartwright, in which he says: "The Country now Upper Canada was not settled or cultivated in any part except the settlement of Detroit till the year one thousand seven hundred and eighty four, when the several Provincial Corps doing Duty in the Province of Quebec were reduced and together with many Loyalists from New York, established in different parts of this Province, chiefly along the River St. Lawrence and Bay of Quenti. In the meantime from the year 1777 many families of the Loyalists belonging to Butler's Rangers, the Royal Yorkers, Indian Department and other Corps doing Duty at the Upper Posts had from Time to Time come into the country and many young Women of these Families were contracted in Marriage which could not be regularly solemnized, there being no Clergyman at the Posts, nor in the whole country between them and Montreal. The practice in such cases usually was to go before the Officer Commanding the Post who publicly read to the parties the Matrimonial Service in the Book of Common Prayer, using the Ring and observing the other forms there prescribed or if he declined it as was sometimes the case, it was done by the Adjutants of the Regiment. After the settlements were



formed in 1784 the Justices of Peace used to perform the Marriage Ceremony till the establishment of Clergymen in the Country, when this practice adopted only from necessity hath been discontinued in the Districts where Clergymen reside. This is not yet the case with them all; for though the two lower Districts have had each of them a Protestant Clergyman since the year 1786, it is but a few months since this [Nassau or Home] District hath been provided with one; and the Western District in which the settlement of Detroit is included, is to this Day destitute of that useful and respectable Order of men; yet the Town of Detroit is and has been since the Conquest of Canada inhabited for the most part by Traders of the Protestant Religion who reside there with their Families, and among whom many intermarriages have taken place, which formerly were solemnized by the Commanding Officer, or some other Layman occasionally appointed by the Inhabitants for reading prayers to them on Sundays but of late more commonly by the Magistrates since Magistrates have been appointed for that District.

"From these circumstances it has happened that the Marriages of the generality of the Inhabitants of Upper Canada are not valid in Law, and that their children must *stricto jure* be considered as illegitimate and consequently not intitled to inherit their property. Indeed this would have been the case, in my opinion, had the Marriage Ceremony been performed even by a regular Clergyman and with due Observance of all the forms prescribed by the Laws of England. For the clause in the Act of the 14th year of His Present Majesty for regulating the Government of Quebec which declares 'That in all cases of Controversy relative to Property and Civil Rights, resort shall be had to the Laws of Canada as the Rule for the Decision of the same' appears to me to invalidate all Marriages not solemnized according to the Rites of the Church of Rome, so far as these Marriages are considered as giving any Title to property.

"Such being the Case, it is obvious that it requires the Interposition of the Legislature as well to settle what is past, as to provide some Regulations for the future, in framing of which it should be considered that good policy requires that in a new Country at least, matrimonial Connections should be made as easy as may be consistent with the Importance of such engagements; and having pledged myself to bring this Business forward early in the next Session, I am led to hope that Your Excellency will make such Representations to His Majesty's Ministers as will induce them to consent to such arrangements respecting this Business as the circumstances of the Country may render expedient. Measures for this purpose have been postponed only because they might be thought to interfere with their Views respecting the Clergy of the Establishment.

"Of this Church I am myself a Member and am sorry to say that the State of it in this Province is not very flattering. A very small proportion of the Inhabitants of Upper Canada have been educated in this Persuasion and the Emigrants to be expected from the United States will for the most part be Sectaries or Dissenters; and nothing prevents the Teachers of this class from being proportionally numerous, but the Inability of the People at present to provide for their support. In the Eastern District the most populous part of the Province there is no Church Clergyman. They have a Presbyterian Minister, formerly Chaplain to the 84th Regiment who receives from Government fifty Pounds p. ann. They have also a Lutheran Minister who is supported by his Congregation, and the Roman Catholic Priest settled at St. Regis occasionally officiates for the Scots Highlanders settled in the lower part of the District, who are very numerous and all Catholics. There are also many Dutch Calvinists in this part of the Province who have made several attempts to get a Teacher of their own Sect but hitherto without success.

"In the Midland District where the Members of the Church are more numerous

than in any other part of the Province, there are two Church Clergymen who are allowed one hundred pounds p. ann. each by the Government, and fifty pounds each by the Society for the Propagation of the Gospel. There are here also some itinerant Methodist Preachers the Followers of whom are numerous. And many of the Inhabitants of the greatest property are Dutch Calvinists who for some time past have been using their endeavours to get a Minister of their own Sect among them. In the Home District there is one Clergyman who hath been settled here since the month of July last. The Scots Presbyterians who are pretty numerous here and to which Sect the most respectable part of the Inhabitants belong have built a Meeting House and raised a Subscription for a Minister of their own who is shortly expected among them. There are also here many Methodists & Dutch Calvinists. In the Western District there are no other clergy than those of the Church of Rome. The Protestant Inhabitants here are principally Presbyterians."

<sup>7</sup> Can. Arch., Q. 279, 1, 227. John King to Simcoe, July 12, 1793. Why King of the Home Department should have written does not appear. At the time, and from 1782 till 1801, the Colonies were allotted to the Foreign Department. The report cannot be found in the files; but Simcoe received it on November 10, 1793 (Can. Arch., Q. 280, 1, 14); he took it home with him; and the late John Ross Robertson was able to obtain a copy of it at Wolford Manor. Through the courtesy of Mr. Irving Robertson, I am enabled to set it out here, which I do in consideration of its interest from a legal point of view:

"Sir

"In obedience to His Majesty's Commands signified to us by your letter of the 22nd May last, directing us to report to you for His Majesty's consideration such provisions as by law we should think necessary for the purposes expressed in the draught of a Bill transmitted to us with the said letter, to make good and valid certain marriages contracted in the Province of Upper Canada, and to provide for the future solemnization of marriages in the said Province, we submit as proper for the purposes which appear to us to have been intended by the draught so transmitted the provisions herewith enclosed. We observe that the draught transmitted to us contains no provision respecting marriages solemnized by Ministers duly ordained either with reference to past or future marriages, and we therefore presume that such provisions have been or are intended to be made by a separate Act.

"We have the honor to be Sir,

"Your most obedient servants,

(Signed) WILLIAM SCOTT

JOHN SCOTT

JOHN MITFORD."

"24th June 1793.

"The Right Honourable Henry Dundas."

[Enclosure.]

"The following are the provisions referred to by the letter enclosed herewith:

"That all Marriages before a day to be specified which shall have been publicly contracted before any Magistrate or Commanding Officer of a Post, or Adjutant or Surgeon of Regiment acting as Chaplain, or before any other person publicly officiating for such purpose not being a Priest or Minister ordained according to the form of ordination in the Church of England shall be declared to be good and valid in law to all intents and purposes as if the same had been duly solemnized by a Priest or Minister duly ordained.



"That for the purpose of preserving evidence of all such Marriages, it shall be lawful for the parties who have contracted such Marriages respectively or either of them to go before a Magistrate and make oath of the fact of such Marriage, the form of the oath being specified in the Act, and the Magistrate being authorized to administer the same.

"That if one of the parties shall be dead it shall be lawful for the survivor to make oath to the same effect according to the circumstances.

"That if both shall be dead, or if both, or either of the parties shall be living and shall require the same, it shall be lawful for a Magistrate to take the deposition on oath of any person or persons present at such marriage.

"That in every such oath or disposition there shall be expressed what issue shall have been born of such Marriages respectively, and the times and places of the birth of such issue so far as such particulars shall be known to the deponents respectively.

"That such depositions when taken shall be subscribed by the persons making the same and certified by the Magistrate, who shall take the same, and be returned and filed in some proper office or offices to be appointed for that purpose, and transcripts thereof shall be entered in books or registers to be kept by such officer or officers.

"That such depositions or such transcripts thereof or copies of the same duly attested as the Act shall prescribe shall be received as evidence of such Marriages respectively, subject to the objections which may be made to the credit to be given to the testimony therein contained.

"That until there shall be in the respective districts of the Province a certain number to be limited in the Act of established Parochial Ministers duly ordained according to the form of ordination in the Church of England, it shall be lawful for parties desirous of intermarrying, and not living within a specified distance of a Parochial Minister or Priest ordained as aforesaid to contract Matrimony before a Justice of Peace, having first obtained a license for that purpose from the Governor or Lieutenant Governor or person administering the Government of the Province to grant licenses for such purpose on notice of such intended marriage having been first duly published at such times, in such manner and according to such form as shall be prescribed by the Act.

"That such Justice shall in pursuance of such license, or after the publication of such notice be authorized to marry such parties according to the form of the Church of England, and shall give the parties a certificate of such marriage in a form to be prescribed by the Act, and to be signed by the Justice and also by the parties and by two or more persons present at such Marriage.

"That the Justice shall transmit or cause to be transmitted to such Officer or Officers as before mentioned, a duplicate of such certificate signed in like manner, which duplicate shall be filed by such Officer and a transcript thereof inserted in the Book or Register before mentioned, and such certificate or duplicate or transcript to be attested as the Act shall prescribe shall be evidence of such Marriage.

"That when there shall be within any district of the Province such number as before mentioned of established parochial Clergy ordained as aforesaid, the same shall be certified by the Governor, Lieutenant Governor or person administering the Government of the Province to a general quarter sessions to be holden for such district, and such certificate shall be publicly read by the Clerk of the Peace and from thenceforth the power of Justices to celebrate Marriages shall cease within such district.

"That if after publication of such certificates as aforesaid any person not being a Minister ordained as aforesaid shall knowingly or wilfully take upon himself to solemnize Matrimony according to the form of the Church of England and be thereof lawfully convicted, he shall be punished in such manner as shall be prescribed by the Act.

"That it shall be no valid objection to any Marriage which has been or shall be



solemnized within the said Province that the same was not celebrated in a consecrated church or chapel.

"That proper fees shall be provided for the Justices and other officers and persons on whom duties shall be imposed by the Act, such fees to be ascertained by the Act.

"That proper compulsory clauses shall be contained in the Act, and particularly clauses to compel persons who shall have been present at any marriage to go before a Magistrate and make deposition concerning the same at the instance of the parties or either of them or any of their issue.

(Signed) WILLIAM SCOTT

JOHN SCOTT

JOHN MITFORD, 24th June 1793."

<sup>8</sup> 7 Ont. Arch. Rep. (1910), pp. 18-21.

<sup>9</sup> 6 Ont. Arch. Rep. (1909), pp. 30, 31, 33, 35, 36.

<sup>10</sup> *Life and Letters of Hon. Richard Cartwright*, Toronto and Sydney, 1876, p. 52.

<sup>11</sup> It was assented to by Simcoe on July 9, 1793, three days before King despatched the opinion of the imperial law officers on Osgoode's bill. Simcoe writes Dundas from "York (late Toronto) U.C.", on September 16, 1793 (Can. Arch., Q. 278, 2, 335), as follows: "The General cry of persons of all classes for the passing the Marriage Bill was such that I could no longer withhold under the pretence of consulting any opinion at home, having already availed myself of that excuse for delay. There are very few Members of the Church of England in either House and the disposition of the House of Assembly is to make matrimony a much less solemn or guarded contract than good policy will justify. They returned the Bill with a rider giving power to Ministers of every sect and denomination (of which in this country there are not a few) to solemnize matrimony, and it was only on a compromise that they were prevailed upon to withdraw it upon the apprehension of some persons in the Upper House of losing what they were likely to obtain by the present Bill and a promise of support to a Bill of any latitude that might be brought in next Session which Mr. Hamilton is to introduce."

<sup>12</sup> Eastern, Midland, Home, and Western were the names substituted in 1792 by the Act 32 George III, c. 8 (U.C.) for Dorchester's original names Luneburg, Mecklenburg, Nassau, and Hesse.

<sup>13</sup> I have been enabled to make this discovery and to copy the entries through the courtesy of Mr. J. W. Mallon, the Inspector of Legal Offices, Osgoode Hall, Toronto. Subsequently I have found that there is a similar book for the old Western District now in Windsor.

<sup>14</sup> Can. Arch., Q. 280, 16. Dundas to Simcoe, March 16, 1794.

<sup>15</sup> Can. Arch., Q. 280, 1, 256. The memorandum is contained in the letter from Simcoe, *ibid.*, 237.

<sup>16</sup> No record of the proceedings of the Upper Canada parliament for the years 1795, 1796, and 1797 is known to exist. We must rely on Simcoe's dispatches and the Woford Manor papers for information. Simcoe writes Portland, who had succeeded Dundas as Home Secretary, on August 22, 1795, as follows: "A petition was also presented from the Presbyterians or Dissenters to repeal such part of the Judicature [*sic*] Act as prevented the Dissenting Minister from solemnizing marriages. Means were found to defer the Petition to the next year when it may be apprehended it will be seriously agitated". (Can. Arch., Q. 281, 2, 453).

<sup>17</sup> *Woford Manor Papers*, vol. 7, p. 178.

<sup>18</sup> Can. Arch., Q. 292, 2, 499-503.

<sup>19</sup> Can. Arch., Q. 278, 1, 175.

<sup>20</sup> *Wolford Manor Papers*, vol. 7, p. 238.

<sup>21</sup> See the *Wolford Manor Papers*, vol. 7.

<sup>22</sup> Chief Justice John Elmsley arrived in Newark in November, 1796. It was his duty to report to the Home authorities on the bills originating in the Legislative Council, and that of the attorney-general on those originating in the Legislative Assembly. As Elmsley reported on this Act, it must have originated in the Legislative Council.

<sup>23</sup> Can. Arch., Q. 284, 50 sqq. Report of Chief Justice Elmsley, November 26, 1797, sent by the Administrator, Peter Russell, to the Duke of Portland.

<sup>24</sup> The royal assent was promulgated by proclamation of date December 29, 1798: the Act should really be cited as of 37 George III, but in the Statutes it is called 38 George III, c. 4.

<sup>25</sup> The "Disruption" or great Secession took place in 1843.

<sup>26</sup> The Tunkers and Menonites (or Mennonites) were sects of Baptists. In an address of the Baptist church in Clinton, District of Niagara, to Sir Peregrine Maitland, lieutenant-governor of Upper Canada, dated at Clinton January 16, 1821, and signed by John Upfold, Pastor, and Jacob Beam, Church Clerk, this church claimed to be Calvinist, because it had "cordially embraced those five grand points of gospel doctrine which Calvin manfully defended against the errors of Popery, *viz.*: Predestination, particular redemption, effectual vocation, justification by the imputed righteousness of Christ and the perseverance of the Saints to glory" (Can. Arch., Sundries, U.C. 1821). It was under the name of "Religious Congregation of Calvinists" that Reuben Crandell, a well-known Baptist elder, received a licence from the Quarter Sessions for the District of Newcastle, on April 9, 1805: he could validly celebrate marriage within that District, but when he removed to another District he was convicted of crime for performing the ceremony there. Some of the Dutch Reformed later united with the Presbyterians.

<sup>27</sup> I have myself heard a very old Methodist tell with glee and pride the story of a Methodist minister from the United States who, on being asked if he would pray for the King, answered, "I have no objections: I guess he is not past praying for."

<sup>28</sup> Elmsley, in the report referred to above (p. 231), says: "It is possible that under the cover of one or other of these classes, attempts may be made by some of the wretched itinerant enthusiasts who infest the States and sometimes wander into this Province, to possess themselves of so valuable a privilege as the power of celebrating marriages, but it is hoped that the qualifications required by the Statute and the discretion vested in the Magistrates in Quarter Sessions will be sufficient to defeat their endeavours" (Can. Arch. Q. 284, pp. 51, 52).

<sup>29</sup> Elmsley says of this clause: "The last clause was framed in order to legalize certain marriages celebrated by a man who whatever his other qualifications, was unquestionably a Minister of the Church of Scotland" (Can. Arch., Q. 284, p. 52).

<sup>30</sup> It is possible that the "Bill for granting Indulgences to the people called Quakers, Menonites and Tunkers" "which passed its third reading in the Assembly, June 23, 1801, but received the three months' hoist in the Council, June 24, 1801, on motion of Cartwright and Baby was a Marriage bill; but I can find no reference to it of any kind, and have nothing but conjecture to offer.

<sup>31</sup> Sixth Ont. Arch. Rep. (1909), p. 119. For leave only two votes were given, those of Timothy Thompson of Lennox, Hastings, and Northumberland, and David McGregor Rogers of Prince Edward and Adolphustown.

<sup>32</sup> Sixth Ont. Arch. Rep. (1909), pp. 263, 265, 268, 269, 270. 272: Seventh Ont. Arch. Rep. (1910), p. 160. The vote in the House of Assembly was 9 to 5 for the bill: the Council was apparently unanimous against it.



<sup>32</sup>Eighth Ont. Arch. Rep. (1911), pp. 63, 64, 71, 73, 75, 77, 78: Seventh Ont. Arch. Rep. (1910), pp. 262, 263.

<sup>34</sup>Eighth Ont. Arch. Rep. (1911), pp. 133, 135, 137, 159, 171, 172, 173, 176, 177: Seventh Ont. Arch. Rep. (1910), pp. 291, 292.

<sup>35</sup>Eighth Ont. Arch. Rep. (1911), pp. 195, 201, 202, 204, 206, 208, 213, 214, 230, 233, 237, 238: Seventh Ont. Arch. Rep. (1910), pp. 306, 309, 310, 31, 312, 313, 314, 316, 317. The conferees for the House were Sherwood, Rogers, Washburn, and McLean (afterwards Chief Justice); for the Council they were Baby and Cartwright. It is almost grotesque to find Cartwright opposing the bill on the ground stated, but after his own case had been fairly provided for, his views seem to have undergone a radical change.

<sup>36</sup>Ninth Ont. Arch. Rep. (1912), pp. 183, 186, 195, 205, 217, 220, 221, 222. The vote was 12 to 7. The record of the proceedings of the Council for this year is lost: and no particulars are available of the course of the bill in Council.

<sup>37</sup>Benajah Mallory, who had been elected for Norfolk, Oxford, and Middlesex in the fourth parliament (1804) and for Oxford and Middlesex in the Fifth Parliament (1808), and who had been unsuccessfully petitioned against by his Tory opponent, Samuel Ryerse, on the ground that he was "a preacher and teacher of the Religious Society or Sect called Methodists" did prove himself a traitor: he left the province, and not appearing to answer an indictment for high treason found against him at the Ancaster "Bloody Assize" in 1814, he was outlawed on July 3, 1815.

<sup>38</sup>Andrew Prindle, born in what is now Prince Edward County in 1780, ordained in 1806, is said to have been the first Canadian-born Methodist Episcopal minister in the province.

<sup>39</sup>Can. Arch., Sundries, U.C., 1821.

<sup>40</sup>Ninth Ont. Arch. Rep. (1912), pp. 458, 462-8, 479, 506, 511-14. The records of the Council for 1818 are not extant.

<sup>41</sup>The Act is (1818) 59 George III, c. 15 (U.C.). The title indicates that it was intended to "provide for the further solemnization of Marriage within the Province", but no such provision is to be found in the Act.

<sup>42</sup>Tenth Ont. Arch. Rep. (1913), pp. 236, 244, 252, 253, 255.

<sup>43</sup>Tenth Ont. Arch. Rep. (1913), pp. 270, 324, 377, 379, 391, 510. The Journals of the Council are not extant.

<sup>44</sup>Tenth Ont. Arch. Rep. (1913), pp. 357, 424, 448.

<sup>45</sup>Tenth Ont. Arch. Rep. (1913), pp. 285, 321, 326, 443, 444.

<sup>46</sup>Tenth Ont. Arch. Rep. (1913), p. 277.

<sup>47</sup>Eleventh Ont. Arch. Rep. (1914), pp. 46, 47, 48, 49, 54, 72, 75, 77, 84, 90, 91, 115, 116, 122, 125, 147.

<sup>48</sup>Eleventh Ont. Arch. Rep. (1914), pp. 306, 319, 340, 342, 344, 403, 405; the divisions are given on pp. 340, 405.

<sup>49</sup>Eleventh Ont. Arch. Rep. (1914), pp. 451, 455, 458, 469, 475, 479, 534, 535. The "Wesleyan Methodists" were those in connection with the English body: Henry Ryan's Canadian Wesleyan Church was yet in the future, and he was in full communion with the Methodist Episcopal Church, being a presiding elder. A petition by "Reformed Methodists" to be relieved from militia duty was refused (Eleventh Ont. Arch. Rep. (1914), p. 302). This petition was very unjustly made use of to cast discredit upon Methodists generally. The "Reformed Methodists" had their origin with Pliny Brett who left the N.E.M.E. Conference in 1813, and formed the new Church of Reformed Methodists. A few in Upper Canada especially in and about Ernesttown joined the secession about 1816-17; they believed in modern miracles, and much re-



sembled the "Nazaries" of the United States. The connexion did not last long in Upper Canada.

<sup>50</sup>Ninth Ont. Arch. Rep. (1912), pp. 422, 423.

<sup>51</sup>This opinion has frequently been published: it is found in convenient form in Charles Lindsey's *Clergy Reserves*, Toronto, 1851, p. 9.

<sup>52</sup>Journals, House of Assembly, 1825-6, pp. 15, 28, 78, 79. The minority were Bartholomew Crannell Beardsley of Lincoln, Thomas Horner of Oxford, Edward McBride of Niagara (Town) and Peter Perry of Lennox and Addington. It is impossible from the division list to determine upon what the House actually divided. It was in this session that the attack upon Chief Justice Powell for being a member of the Executive Council was made in the House (Journals, Legislative Council, 1825-6, pp. 28, 30, 31, 35, 43, 50, 52).

<sup>53</sup>Journals, House of Assembly, 1826-7, pp. 3, 19, 39, 80, 83. Journals Legislative Council, 1826-7, pp. 63, 66, 71.

<sup>54</sup>Journals, House of Assembly, 1828, pp. 19, 21, 22, 91, 106, 113, 114. On the first division the attorney-general, John Beverley Robinson, stood alone; in the second he was joined by Francis Baby (Essex), Duncan Cameron (Glengarry), James Gordon (Kent), Charles Ingersol (Oxford), Charles Jones (Leeds), Jonas Jones (Grenville), William Scollick (Halton), William Thompson (York and Simcoe), Philip VanKoughnet (Stormont), and Reuben White (Hastings), the full Tory strength; in the third division the attorney-general carried with him of his former fellows Cameron and Scollick, he acquired Zaccheus Burnham (Northumberland), David Jones (Leeds), Archibald McLean (Stormont), John Matthews (Middlesex), who had not voted on the previous division; VanKoughnet and White deserted him for the winning side.

<sup>55</sup>Journals, House of Assembly, 1829, pp. 5, 9, 13, 46, 47, 48, 76. Journals Legislative Council, 1829, pp. 18, 24, 29, 30, 31, 57, 92.

<sup>56</sup>Can. Arch., Q. 351, I, p. 85. The letter is mostly on university matters.

<sup>57</sup>Can. Arch., Q. 351, p. 326.

<sup>58</sup>Journals, House of Assembly, 1830, pp. 1, 3, 14, 60, 66. Journals, Legislative Council, 1830, pp. 11, 13, 20, 73.

<sup>59</sup>The first two were staunch Liberals, the second rather uncertain, and the fourth was replaced by Paul Peterson, an undoubted Liberal.

<sup>60</sup>Journals, House of Assembly, 1831, pp. 3, 5, 13, 14, 15, 16, 19, 28, 31, 32, 45, 46, 47, 75. Journals Legislative Council, 1831, pp. 42, 44, 52, 54, 55, 66, 68, 69.

<sup>61</sup>Regina v. Duckout (1893) 24 O.R. 250.

<sup>62</sup>Rex v. Brown (1908) 17 O.L.R. 197. Robert Brown got up a congregation in Toronto, "The First Christian Chinese Church, Toronto", and as the minister of that church solemnized marriages; he was convicted, and the conviction was affirmed by the Court of Appeal.



# The Canadian Historical Review

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OF

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établissement commencé il y a sept ans par l'ordre de Monsieur de Ponchartrain, un nomme Le Mothe commandoit la, il y a un fort nommé le fort de Pontchartrain, ou il y a deux cent hommes, soldats et habitants, un nomme Degremont a este à Niagara pour en faire le plan et il est allé en France pour faire son rapport, pour qu'il soit fortifié. C'est un endroit qui estant fortifié empechera nos sauvages d'aller à la chasse, il y a cent et vingt grandes lieues d'albanie à Niagara, de Niagara au Destroit il y a quatre vingt lieues au sud ouest. Monsieur de Vaudreuil est gouverneur du Canada, Monsieur Rodeau [Raudot] le pere est intendant du Canada, le fils Intendant pour les troupes, Monsieur Supercasse [Subercase] est gouverneur de l'Acadie. D'Albany a Chambly il y a 80 lieues par eau, de la par terre a Mont Real il y a sept lieues mais par eau il y en a 36. Le grand portage est de quatre lieues. Il y a des bonnes maisons a Mont Real, cet homme icy est charpentier de son metier.

#### THE ORIGINAL "SALARY GRAB" IN UPPER CANADA

When Upper Canada set up as a country legislating for herself, her constitution was described by her first lieutenant-governor, Colonel John Graves Simcoe, as "the very image and transcript" of that of the mother country.<sup>1</sup> Nor was this wholly untrue. There was an Executive Council corresponding to the ministry, and responsible to the governor representing the king, a Legislative Council not wholly unlike the House of Lords (the members having a life tenure but the office not being hereditary) and a Legislative Assembly of elected members which claimed the privileges and sometimes used the name of the House of Commons.<sup>2</sup>

The members of the Executive Council, which as such was no part of the parliament, were paid by the imperial government

<sup>1</sup> Speech from the Throne on prorogation, October 15, 1792; 6 Ont. Arch. Rep. (1909), 18.

<sup>2</sup> E.g., on June 17, 1793, a resolution was carried in the Assembly "That the Speaker do inform N. B. Sheehan, Esquire, Sheriff of this District [the Home, formerly the Nassau, District], that the House entertain a strong sense of the impropriety of his conduct towards a Member of this House in having served a Writ of Capias upon the said Member contrary to his Privilege, and that the House has only dispersed with the necessity of bringing him to their Bar to be further dealt with from a conviction that want of reflection and not contempt made him guilty of an infringement upon the privileges of the House" (6 Ont. Arch. Rep., 1909, 21, 22). So, too, the members had the same privilege from arrest from forty days before to forty days after the sitting of the House. Rex, Gamble and Bolton (1832), 9 11. C.R. 546; Cix and Prior (1899), 18 P.R. 492.

£100 sterling each.<sup>3</sup> The legislative councillors had to take their pay in the honour of their position, but the members of the Legislative Assembly were not so patriotic. The province was a country of magnificent distances, and the members of the Assembly were, for the most part, men who were without means except the land which they held for themselves and their children.

In the first session there was considerable private discussion—I do not find that the matter was brought up in the House—as to the members being paid; and Simcoe reported officially that “many of the Members were not averse to Parliamentary wages.”<sup>4</sup>

In the second session, beginning May 31, 1793, a bill was introduced, and read the first time on June 18, to provide a fund for paying the wages of the “Members of the House of Assembly”. The bill was much more comprehensive, and it received its proper name on going into committee on June 25—“An Act to authorize and direct the Laying and Collecting of Assessments and Rates in Every District within the Province and to provide for the Payment of Wages to the Members of the House of Assembly.” The bill passed the committee, and was read the third time in the House, and sent up for the concurrence of the Legislative Council on July 4: it was read there the first time on the same day, the second and third times the following day, but did not finally pass until July 6, when it was sent back to the Assembly with amendments. The house concurred in the amendments, and returned the bill to the Council: it was then assented to by Simcoe on July 9, and so became law.<sup>5</sup>

This Act is not only the first for the payment of parliamentary wages in Canada, but also the first of a long train of Assessment Acts. It provided for taxation to pay for gaols, gaolers’ salaries,

<sup>3</sup> Reduced very considerably sometimes by income tax and exchange. In those days £9 sterling equalled £10 currency. The “old par” of £1 sterling equalled \$4.44; £1 currency, \$4.00.

<sup>4</sup> See the very interesting despatch of Simcoe to Dundas, dated Navy Hall, November 4, 1792 (Can. Arch. Q. 279, Pt. 1, pp. 79 sqq.). Simcoe says of the members of the Lower House: “The persons who composed . . . the House of Assembly consisted chiefly of the most active characters in the several Counties. It was impossible to obtain any knowledge of the temper and disposition of the several candidates from the want of Intercourse and Communication, and perhaps had any wishes been formed for the success of any particular candidate, they must have been unavailable as no means could have been found to suggest them.” He was right; the members of the first House were in almost every instance outspokenly independent of governmental wishes.

<sup>5</sup> 6 Ont. Arch. Rep. (1909), pp. 32, 36, 39, 40, 42; in the Legislative Council, 7 Ont. Arch. Rep. (1910), pp. 29, 30, 33. The Act (1793) 33 George III, C. 3 (U.C.).



houses of correction, coroners, bounty for destruction of bears and wolves, "and other necessary Charges within the Several Districts of this Province". Section 30, after reciting that "it was the ancient usage of that part of Great Britain called England, for the several members representing the Counties, Cities and Boroughs therein to receive wages for their attendance in Parliament", enacted that every member of the House of Assembly should be entitled to demand, from the justices of the peace of the district in which his riding was situated, a sum not exceeding ten shillings<sup>6</sup> for each day he had been engaged in attendance in the House, and had been necessarily absent from his home, the amounts to be paid by local assessment provided for by the same Act. Simcoe did not like the Act. Although he gave the royal assent, he wrote in his official despatch to Dundas that the fund to be raised would, after the county charges had been paid, "leave a sufficiency for wages for the members . . . and some members insisting upon the payment of wages it was thought most equitable that they should be paid by the several constituencies to those who chose to demand them by a particular vote upon the plan of the District Assembly," *i.e.*, the quarter sessions of the district. Simcoe adds: "This project has already created some disgust and will probably lead to offers of unrewarded service from the candidates at the next elections".<sup>7</sup>

There is no extant contemporary account of any disgust being expressed except by those who did not receive wages, and there is no instance on record of any candidate offering his services without wages or reward, since few could afford it.

Dundas was as indignant as Simcoe himself. Writing on March 16, 1794, shortly after Simcoe's despatch must have reached him, he says of the members of the assembly: "Much is to be allowed to the novelty of the duties imposed on them and to the light in which they are called upon to view things, namely as not connected with them or that local consideration, but with the Protection and Welfare of the Province at large . . . a mode of viewing things naturally repugnant to the first impressions created in their minds. Nothing could tend more completely to the continuance of such first impressions and of course to a narrow and contracted policy than the idea of the members receiving

<sup>6</sup> Ten shillings currency, or nine shillings sterling, say \$2.20—not an extravagant amount when day-labourers received four or five shillings per day.

<sup>7</sup> Simcoe to Dundas, "York (late Toronto)", September 16, 1793 (Can. Arch. Q 279, pt. 2, pp. 335 sqq.).

wages from their several Constituencies, an idea which I trust will not be entertained by the Assembly for a moment."<sup>8</sup> *De haut en bas*.

However, the mischief was done; and while it is practically certain that had Simcoe received this despatch before the pre-rogation of parliament he would have reserved the bill for the royal assent, it was not thought wise to take any action in the matter. After all it was the money of Canadians, and not that of the Mother Country, which was to be used in this way.

There can be no doubt that the payment of wages by constituencies to their representatives in the House of Commons was the "ancient custom", but it had long been obsolete. Indeed, while there were "isolated instances of local payment of wages during the Commonwealth, as for instance at Newcastle-on-Tyne in 1654, such payment had long ago generally disappeared and it may be concluded that Andrew Marvel was the last member to receive wages regularly and freely paid by his constituents"<sup>9</sup>. Simcoe's expectation of the result from members claiming wages had much justification in the history of parliamentary wages in the Old Land: claims for wages were frequently made by retiring members of the House of Commons in England by way of a lever to secure their easy re-election on condition that they would not press claims. So common was this scandal that at one time a bill was introduced to put an end to wages for members. This bill failed of passage, however, and there was no prohibition against such claims. In Scotland, there were instances of members being elected on the express condition of charging no fees: no wages were paid there after the Union of 1707. In Ireland, such arrangements were not uncommon: on the eve of the dissolution of 1666, the House freed the constituencies from the payment of wages, for the parliament then approaching its end, by resolution "that in respect of the poverty of this Kingdom and the many taxes now upon it the members of the House do freely remit their several wages due to them for sending them to parliament." This did not quite put an end to the practice, for as late as 1727 members made agreements with their constituencies not to

<sup>8</sup> Dundas to Simcoe, Whitehall, March 16, 1794 (Can. Arch. Q 278 A, pp. 35 sqq.; Q 280, pt. 1, pp. 16 sqq.).

<sup>9</sup> E. Porritt, *The Unreformed House of Commons*, Cambridge, 1903, Vol. I, p. 51. In Vol. II, pp. 34-36, 76, will be found an account of such wages in Scotland. They were not paid after the Union. As to Ireland, wages there came to an end practically in 1666.



charge wages for their services in parliament.<sup>10</sup> The method provided by the Act of 1793 for the payment of the wages of members of the Assembly did not prove at all satisfactory. The statute reads: "It shall and may be lawful for the said Justices [*i.e.*, the justices of the district in which the riding was situated] to levy by assessment to be made on each and every Inhabitant Householder in the several Parishes, Townships, reputed Townships or places within the County or Riding represented by such Member by virtue of and in pursuance of an Order to be by the said Justices made for that purpose to the High Constable of the District who shall and may thereupon issue his Warrant to the Assessors of the Several Parishes, Townships, reputed Townships and places as aforesaid who shall assess the same . . ."; and in case any person should refuse or neglect to pay his assessed quota, the amount was to be levied by distress.

It requires no great effort of the imagination to recognize the unpopularity of such a special tax, and the members of the assembly found it unpopular. The matter was frequently mentioned in the general election of 1797 for the second parliament, and some of the candidates promised relief.

Nothing was done in the House in the session of 1797, so far as existing records show; but the proceedings of this session in both Houses are missing. In the session of 1798, which opened on June 5, David McGregor Rogers, member for Prince Edward and Adolphus, obtained leave on June 7 to bring in a bill "to remedy the inconveniencies arising from the present method of levying supplies to defray the expenses of members of the House of Assembly." It received its first reading; the next day it was read the second time, and went into committee of the whole. On June 11 it was passed and sent to the Legislative Council.

The change to be effected by this bill was to make the members' wages part of the expenses of the whole district, to be levied as part of the general rate.

The Council made some amendments, in fact emasculating the bill, and making the member's wages payable as before out of the taxes of his own constituency. The Assembly declined to agree to the amendments, and the bill dropped<sup>11</sup>.

<sup>10</sup> *Op. cit.*, vol. II, pp. 34-36, 76, for Scotland; pp. 186, 194-198, 202, 328, for Ireland.

<sup>11</sup> In the Assembly: 6 Ont. Arch. Rep. (1909), pp. 58, 59, 60, 61, 65. In the Council: 7 Ont. Arch. Rep. (1910), pp. 60-63.



The Assembly was not at all pleased with what it considered the cavalier treatment of its bill: on June 30, Rogers moved and Dr. Solomon Jones, member for Leeds and Frontenac, seconded a motion "for leave to bring in on Monday a Bill to provide for the expenses of the Members of the Assembly while attending their service in Parliament." On Monday, July 2, the bill was read for the first and second times, and went to committee of the whole; the Committee promptly reported it, and it was the next day read the third time, and sent up to the Council, where it received the "three months' hoist" the same day, July 3.<sup>12</sup>

Thus far, the Assembly was within its undoubted rights, while the Council cannot be blamed for the implied rebuke of its peremptory treatment of the last-named bill whereby the Assembly had tried to get round the action of the Council on the former.

But now the Assembly went quite astray, and tried to bring about the first "salary grab" in Canadian history.

There was a provincial fund for paying the salaries of the officers of the Legislative Council and Assembly and for defraying the contingent expenses, stationery, etc. This was made up from licence fees from liquor dealers, and those who kept houses of public entertainment<sup>13</sup>. There were also certain licence fees from distillers<sup>14</sup>.

The House went into committee of the whole on the public accounts on June 15, 1798, and had obtained full information concerning the receipts and expenditures. It was found that there was a surplus, and when the news came that the Legislative Council had killed the Assembly's bill, the committee of the whole, on July 5, "after mature consideration recommended to the House to vote . . . sums . . . to reimburse twelve members their travelling expenses and during their attendance in Parliament this Session, the new mode of assessment not taking place this year". Parliament was prorogued the same day, the last

<sup>12</sup> In the Assembly: 6 Ont. Arch. Rep. (1909), pp. 81, 84, 85. In the Council: 7 Ont. Arch. Rep. (1910), p. 75.

<sup>13</sup> (1793) 33 George III, cc. 10, 13 (U.C.); (1797) 37 George III, c. 11 (U.C.). Liquor vendors paid £1/16 sterling per annum to an imperial fund. The colonial Act imposed a further sum of 20 shillings currency (say \$4.50). The keeper of a house of public entertainment paid the same, but was to be relieved of the 20 shillings tax from and after April 5, 1796. (1794) 34 George III, c. 12 (U.C.), regulated such houses and vendors, as did (1796) 36 George III, c. 3 (U.C.) and (1797) 37 George III, c. 11 (U.C.).

<sup>14</sup> (1794) 34 George III, c. 11 (U.C.).

act of the committee being to resolve that a copy of their journal should be presented to the House as their report, and the last act of the Assembly the adoption of their report<sup>15</sup>.

The Speaker sent, on July 9, to Peter Russell,<sup>16</sup> the President and Administrator his certificate of the various sums which had been voted payable out of the Provincial Fund. Russell recognized that the fund had been formed by parliament for a particular purpose, and that the one House had no power to change its destination. He laid the matter before the Executive Council on July 9, and the Council were unanimous that he could not honour the vote of the House.

Russell, accordingly, wrote to David William Smith, Speaker of the Assembly, on July 14, that he "was struck by the singularity of this application of the present Revenue which appeared to me to have been destined by the three branches of the Legislature to another service and consequently not at the disposal of any single one to be diverted into a different channel without the joint concurrence of the other two." He rather cruelly added that the opinion of the Council was based upon the fact that "the law had already made an ample provision for the

<sup>15</sup> 6 Ont. Arch. Rep. (1909), p. 91, for the resolution as to reimbursement and p. 92 for the action of the committee and House. The twelve members in attendance, not including the Speaker, who was paid £200 currency (say \$900), were:

Richard Wilkinson, Glengarry, 1st riding.

John Macdonell, Glengarry, 2nd riding.

Robert Isaac Dey Gray, Stormorel.

Capt. Thomas Fraser, Dundas.

Major Edward Jessop, Grenville.

Solomon Jones, M.D., Leeds and Frontenac.

Christopher Robinson, Ontario and Addington.

David McGregor Rogers, Prince Edward and Adolphus.

Richard Beasley Durham, York and 1st riding Lincoln.

Samuel Street, Lincoln, 2nd riding.

Benjamin Hardiston, Lincoln, 4th riding and Norfolk.

John Cornwall, Suffolk and Essex.

The Speaker was the Hon. David William Smith, afterwards Sir David William Smith, Bart., and pensioner.

<sup>16</sup> Peter Russell, president of the Executive Council, became administrator of the government on Simcoe's departure for England on leave of absence in July, 1796, and continued in that office until the arrival of Lieutenant-governor Peter Hunter in August, 1799. He did not know much law, although he acted as judge of the Court of King's Bench for several terms; but he had a fund of shrewd common sense. He is perhaps best known for his acquisitiveness when head of the Government. "I, Peter Russell," granted much land to "you, Peter Russell". His property was the foundation of the Baldwin fortune.

payment of their wages", and "no other made could be adopted except by passing a new Act to constitute another made for that purpose".<sup>17</sup>

And thus that "salary grab" failed<sup>18</sup>.

WILLIAM RENWICK RIDDELL

<sup>17</sup> 6 Ont. Arch. Rep. (1909), p. 103.

<sup>18</sup> An attempt was made in vain by the Assembly to pass the desired legislation in 1799: see 6 Ont. Arch. Rep. (1909), pp. 105, 106, 108-111, 117. In 1803, the Act was finally passed: see 6 Ont. Arch. Rep. (1909), 375-377, 379, 381, 382, 392, 393, 399, 409, and 7 Ont. Arch. Rep. (1910), 195, 196, 198. The Act was (1803) 43 George III, c. 11 (U.C.), which provided for the Speaker giving to any member demanding it a warrant upon the quarter sessions for the payment out of the funds of the district the amount to which the member was entitled (sec. 1). Sec. 30 of the Act of 1793 was repealed (sec. 2). The assessment for this purpose to be made and levied like any other assessment, and the rate paid in to the treasurer of the district. There are many entries of such payments extant in the proceedings of quarter sessions: see Riddell, *Some Early Legislation and Legislators in Upper Canada* (Canadian Law Times, 1920).



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the case in extremely few persons who are coloured thinkers. No common origin of external source can make one person think of August as white, another brown, another crimson. If August is white to one person because it is the month of white harvest, then it ought to be white to all persons capable of receiving impressions as to harvest colours at all. But to the vast majority of people it is the supremest nonsense to talk of August as having any colour, and to the few who think it coloured it has not by any means the same colour.

It might be thought that the colours attached to the individual letters of a word would, when mixed together, yield the colour attached to the concept of the entire word. Only in a few accidental cases is this so. In the majority of words the colour of the entire word has no relationship to the colours of the component letters. Thus the word Tuesday is white for a certain coloured thinker for whom t is blue-black; u, gray; e, brown; s, yellow; d, brown; a, white; and y, yellow—colours which when mixed together could not possibly yield white. Nor do the physiological theories of colour-vision throw any light on the matter, although they have been ex-

haustively examined with this end in view. To enter even on an outline of these hypotheses would lead us too far into biological technicalities.

The consensus of opinion seems to be that the tendency to coloured thinking is an innate mental capacity analagous to the artistic, the musical, the mathematical, or other inherited forms of genius or disposition. The different kinds of genius are notoriously not conferred by training or education; if not inherited they cannot be acquired. Precisely the same may be said of coloured thinking. Chromatic conception is not an activity of the ordinary mind; neither is genius. It is not in the ordinary type of mind, but in the slightly aberrant, that the more recondite problems of mental physiology present themselves to receive that adequate study which can alone lead to a satisfactory explanation of their causal antecedents. Coloured thinking is as much a phenomenon of nature as is the rising of the sun or the falling of the tide, and we doubt not that in due time science will be able to explain the mental with as much precision and conviction as she now interprets the physical, for all the cosmos, microcosm and macrocosm in her parish.





# ANOTHER PATRIOT GENERAL

*By the Honourable William Renwick Riddell*

IN *The Canadian Magazine* of November, 1914, appeared an account of Thomas Jefferson Sutherland, a General in the "Patriot" army of 1838. The following article deals with his comrade Edward Alexander Theller, who hated and despised him and was hated and despised by him in equal measure.

Theller was born in Colerain, County Kerry, Ireland, January 13th, 1804, of a good family; he received a good education and distinguished himself as a linguist; even as a youth he became proficient in French and Spanish, an accomplishment that was to stand him in good stead in later life. At a rather early age he came to the United States, but retained to the end his love for his native land and (what he considered a necessary corollary) his hatred for England and all things English.

When the time came for him to elect his allegiance, he became an American citizen, formally forswearing all allegiance to the King in whose dominions he had been born. About 1824 he came to Montreal, where he studied medicine. A fellow student was Dr. Chénier, who was to become a prominent leader in the Rebellion in Lower Canada and to die in battle at the Church at St. Eustache. Some say that Theller was for a time a member of a free love community in New York State.

Theller practised medicine for a

time in Montreal and also carried on a drug store in partnership with Dr. Willson, after whose death he married his widow, Ann Pratt, a lady of some means, daughter of an English gentleman. He seems to have been convinced of his success as a medical man, especially in healing cholera.

His residence in Lower Canada increased rather than diminished his hatred of Britain; and in 1832 he removed from under the flag, settling in Detroit, which had been visited by an epidemic of cholera. Both in that year and in 1834, in another epidemic of cholera, he did good service as a physician.

A man of much energy, he prospered financially and in a few years he was the owner of a wholesale grocery store and also of a drug store; he was as well a physician in active practice in partnership successively with Dr. Lewis F. Starkey and Dr. Fay. He became one of the most prominent supporters in Detroit of the "Patriot" cause; and when an invasion of Upper Canada was planned in the winter of 1837-38 he was chosen as Brigadier-General to command the first Brigade of French and Irish troops to be raised in Canada. The "Sympathizers" were firmly convinced that it only required a force of invaders to appear, to cause the Canadians to rise *en masse* against the supposed tyranny of Britain. Theller, indeed, continued to believe that

excepting the Orangemen, "the vile Orange faction", and the Family Compact there were very few loyal Canadians. He writes: "Nor did I meet during all my stay in Canada with but two Roman Catholic Irishmen who were loyal or wished well to the British Government". He seems never to have heard of the Irish Roman Catholics of Peterborough, who marched from that place to Toronto in the depth of winter to offer their services to the Governor.

Theller was determined not to violate the laws of the United States by taking any part in levying a force or joining one in the United States. Taking advice from the United States District Attorney, he considered that joining out of the United States, an expedition which had come from there, even though it might have been previously and unlawfully set on foot within the jurisdiction of the United States, was perfectly legal and did not violate the American statutes. Accordingly, upon the day agreed upon for a rising opposite Detroit, he crossed over to Canada in a ferry boat and landed at Windsor.

The "rising" did not rise, and after a wordy encounter with the redoubtable Colonel Prince, Theller returned to Detroit. This was not the first that these two met nor was it to be the last time. Theller had previously been the cause of Prince being arrested in Detroit for a debt alleged to be owing to an Irish servant for wages; and the men were bitter enemies. Prince he describes as follows: "Dark and mysterious, cruel and vindictive, plausible but to deceive, he spared neither money, nor time, nor art to crush the spirit of reform and blight the hopes of the friends of Canadian independence". Prince in turn describes Theller as a "d——d piratical scoundrel".

An invasion was then planned from Gibraltar, about twenty miles below Detroit, and Theller made his way thither, still determined not to join the force or do anything except be-

yond the legal jurisdiction of the United States; so far, however, as his "advice was of service it was freely tendered and accepted"; this he calls being "nicely scrupulous about the law", but many a man has been hanged for less.

He crossed over from Gibraltar in a small boat into British waters and took command of the stolen schooner *Ann*. The following day, January 9th, 1838, when discharging the cannon with which the *Ann* was armed, he received a blow on the head from the recoiling gun that felled him to the deck and down the hatch-way into the hold. Before he could recover himself, the *Ann* had been captured by the gallant Canadian militia. Stunned and senseless, Theller was dragged out by the victors, and upon partial recovery he found himself and his comrades under the charge of Lieutenant Baby. He was taken to the hospital, and when enjoying a refreshing and invigorating sleep was awakened by a kick on the ribs from his ancient enemy Colonel Prince, who ordered him to be tied and taken to Fort Malden.

Next day, tied two and two and thrown into the bottom of a wagon, Theller and his captive comrades were sent off to Toronto, accompanied by a strong guard of soldiers and a dozen of the St. Thomas volunteer cavalry riding alongside and going ahead as scouts. The officer in charge of the escort was found to be an old acquaintance of Theller's, Dr. Breakenridge, who had studied his profession in Detroit in the office of Dr. Fay, Theller's former partner. But Breakenridge was "the son of an old revolutionary Tory" and "was well worthy of his sire"; and "this most ungrateful wretch", although Theller had "for months saved him from literally starving", treated the prisoners even worse than his instructions from Prince warranted.

After a tedious journey of five days they reached London, an "apparently flourishing village . . . on the



River Thames". Ten days in the London gaol passed before an order came for Theller and some others to be taken to Toronto. On this journey the prisoners were not tied.

The cavalcade passed through Brantford and Hamilton, and at length arrived at Toronto. The last words Theller heard before passing through the prison doors came from a "decent-looking man": "Bad luck to you impudent face, you bloody Yankee! I hope I may never see you come out of that place until the morning you are to be hung".

On March 24th, 1838, he was presented with a copy of an indictment for treason and on April 6th was called to trial. Mr. Hagerman, the Attorney General, and Mr. Sherwood prosecuted, and the sole defence was that Theller was not a British subject but an American citizen. The Crown admitted that he was a naturalized American citizen, but claimed that "once a subject always a subject" and that he was still a British subject. The facts were proved, and the jury speedily gave their verdict: "If the prisoner is a British subject, he is guilty of Treason". Theller and some American writers preposterously contended that this was a verdict of acquittal; but by the law of England (then and until 1870) and by the law of Upper Canada, the prisoner was a British subject; and he was rightly convicted. Mr. J. E. Small, one of the leaders of the Bar and some time Treasurer of the Law Society, assisted Theller in his defence and remained his staunch friend. Theller describes Hagerman—"Handsome Kit"—as "a large man with an unmeaning, bloated countenance; his nose had been broken but whether in a midnight brawl or not I cannot say, but it gave a hideous and disgusting look to his face"; Sherwood was a "sprout of revolutionary Toryism"; Chief Justice Robinson guilty of "strange perversion", and the jury "all a packed jury of tories"; the law "unjust, tyrannical and barbarous".

On April 10th he was called up for sentence; the sentence was, of course, that he should be drawn to the place of execution on a hurdle and hanged a fortnight thence, and that his body should be given to the surgeons for dissection.

The execution of Lount and Matthews he saw; he arranged with Dr. King "an alderman and an Irishman too" for his burial in the doctor's "own family burial-place in the Catholic burying-ground". Thinking his petition to the Governor would be futile, he prepared for death. Sir George Arthur, however, determined to reserve his case for her Majesty's pleasure by reason of the great legal questions involved. Theller, it is true, and those who accept his statements as gospel, say that his reprieve was due to a fear that the Irish troops would mutiny if he an Irishman were executed while the sentence of General Sutherland an American was commuted—*credat Judaeus Appella*.

On St. George's Day, Theller's faithful wife left behind at Detroit, came to Toronto from Lewiston by the American steamer *Oneida* and made her way to the gaol, while friends who were to present a new petition to Sir George Arthur were hastening to Government House. They soon brought the good news that those whom the prisoner calls "the tyrant and his minions of the perjured wool-sack and the Council" respited him from immediate death. It was currently reported that at the first petition the Council was equally divided, two for reprieve and two opposed, including "a bloodthirsty old Scotsman, Allen or Billy Allen as he was called, . . . who was decidedly for hanging and quartering and could not be persuaded to yield a jot . . . one of the Council, the Honourable Mr. Draper (Solicitor-General) being absent on the London circuit". However that may be, the second petition was successful.

Shortly afterwards he was visited in prison by the Honourable Aaron



Vail, who had been commissioned by the American Government to look into the situation of the American prisoners, but he could afford no relief.

An outbreak of smallpox induced the Government on the representation of "Dr. Widmore (i.e. Widmer) a good, kind-hearted man" to weed out the prison, and on May 15th some fifty-five prisoners were released after entering into recognizances to keep the peace for three years. Some returned to their Canadian homes, but "most of them preferred to leave the country, property and all and go into the United States". Next day orders came to remove Theller and others, twenty-five in all, to Fort Henry, Kingston. Escorted by a guard of negro volunteers, the unfortunates, chained two and two, were taken by Sheriff Jarvis to the Steamer *Commodore Barry* and huddled in the after part of the boat, closely penned in and still in chains.

A plot to take possession of the steamer and run her into Sackett's Harbour came to nothing, owing, Theller says, to Sutherland's cowardice. After remaining in Fort Henry overnight, Theller and the other nine American prisoners "were again placed under our sable escort and marched . . . to a boat," to be taken through the Rideau Canal to Lower Canada. Changing boats at Bytown (Ottawa), they made their way down the River to "Granville" (Grenville); then marched across about fifteen miles to Carillon and embarked on another boat, which took them to Lachine. At Carillon a negro soldier who had "been a slave in Kentucky, from whence he had run away" was drowned, and all Dr. Theller's efforts at resuscitation proved fruitless.

From Lachine they went by barge to Montreal and were incarcerated in the new gaol. Theller gives an interesting account of the conduct of the crowd who watched their March from the River to St. Paul's Street and from there to New Market and thence

to the gaol: "The most abusive epithets against ourselves and country were made use of; such as d——d Yankees, sympathizers, pumpkin-eaters, wooden nutmegs".

The fare in Montreal gaol was an admirable contrast to that at Toronto: "Roast and boiled, fish and flesh, fricassees, ragouts, patés, innumerable, and even the *coup d'appetit* in the shape of good rum was not wanting. Brandy, gin and wine of all sorts and qualities were set on; and we poor hungry, half-starved wretches thought it must be queer fare to have in prison". It was no wonder that they thought "old Kidd, the jailer in Toronto, would stare could he but see such a table . . . or Molineaux, his deputy, the old skunk". But this food was not the regular gaol fare; it was a present from the political prisoners, "lawyers, notaries, priests, seigneurs and other wealthy landed proprietors". These prisoners also sent what they could spare of their clothing, such as shirts, drawers, stockings, shoes, which were much appreciated by the half-clad Americans.

The stay in Montreal was short; the prisoners were taken by boat to Quebec. They were put in the hold of the vessel, as the owners, John Torrance & Company had given orders that the cabins were not to be polluted by the presence of any Yankee brigand. Touching at Three Rivers, a copy of Lord Durham's Proclamation was procured. Theller did not think anything would come of it in the existing miserable state of Canada. At Quebec they were lodged in the Citadel. An order came to send Theller to England, but in October he managed to effect his escape with several others. After lying concealed in Quebec for a short time, friends took him, along with Colonel Dodge, across the River and finally across the line.

They then went to Augusta, Maine, sailed thence by the Steamer *Vanderbilt* for Boston and thence to New York, where they met William Lyon

Mackenzie and several Patriots who had just arrived from exile in Bermuda.

Theller attended and addressed meetings with Mackenzie in New York, Philadelphia, Washington, and Baltimore in favour of the Canadian rebels, but the news from Canada was discouraging, and sick at heart he took his way homeward by the great western route, the national road. Crossing the State of Ohio to Cleveland, he took the stage for home, travelling day and night to prevent the utter folly of a proposed invasion of Western Canada from Detroit. He arrived in Detroit December 4th, 1838, too late to check the invasion which had already begun and which resulted so disastrously for many of the invaders.

On the second day after his arrival he was arrested to answer to an indictment which some of his friends, during his imprisonment in Canada and with a hope of procuring his extradition, had caused to be found against him for breach of the neutrality laws of the United States. In the following term, June, 1839, he was acquitted; perhaps the fact that the presiding Judge was Ross Wilkins, who had taken quite as active a part in the Patriot movement as Theller himself, may have had something to do with this result.

During the summer of 1839 Theller started a daily paper, *The Spirit of '76* or *Theller's Daily Republican Advocate*, which he published for about two years; it had also a weekly edition.

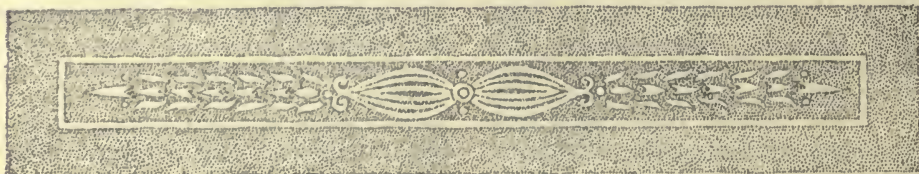
In 1841 he published a book in two volumes, "Canada in 1837-38", which contains a history of the rebellion and

especially his own part therein. It contains a good deal of "fine-writing," much gasconading, much evidence of hatred of Britain, but little of value historically or otherwise. Unlike Sutherland's production, this work is quite common.

The cholera was raging in Buffalo in that year, 1841, and thither Dr. Theller went and resumed the practice of medicine. In 1849, hearing that there was in Panama an epidemic of yellow fever, he made his way to that city. He was met there in 1857 by Mr. Kingsford, who in his "History of Canada" gives an account of the meeting. He was at the time keeping the Cocoa Grove Hotel in the suburbs, a most beautiful spot.

He went from Panama to San Francisco, where he started and edited *The Public Ledger* and afterwards *The Evening Argus*. He died at Hornitos, Mariposa County, California, May 30th, 1859, in his 56th year. One of his sons who was in the United States Army was killed by the Nez Percés in 1877; the other two both lived in San Francisco; his only daughter married F. X. Cicott of Detroit and died in 1865 while her husband was Sheriff of the County, leaving a number of children.

Theller was "plump, full-figured, black-haired, with blue eyes, straight well-formed nose and high forehead, and about five feet six inches in height"; believed himself to be like Napoleon both in person and in genius, with a magnetic tongue, "an Irish enthusiast for anything opposed to Great Britain, a native born Fenian". So say those who knew him; but without he was a kindly soul, with an open heart and hand for the unfortunate.





# THE CANADIAN MAGAZINE



SEPTEMBER, 1918

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## A BIRTHDAY BALLADE

(TO CHARLIE)

By ALFRED GORDON

"I SHALL never, never grow old!"  
Have your way, my lad, have your way!  
'Tis only old fogies that hold  
We crumble to dust, and decay.  
In vain I cry out to you, "Stay!  
Remember the years and their rue!  
The world was not made for mere play!"—  
For I once had the same visions too!

"All I touch shall turn into gold!"  
Well, it may, my lad, well it may!  
'Tis a tale that's so often been told,  
It surely must happen some day!  
And, indeed, if you think of it, pray,  
Why shouldn't it happen to you?  
To such logic 'tis hard to cry nay—  
For I once had the same visions too!

"My fame round the world shall be rolled!"  
So you say, my lad, so you say!  
"Though the sun and the stars shall grow cold,  
It shall echo for ever and aye!"  
Ah, yes! Though perpetual gray  
Has clouded me half my life through,  
In vain on such dreams I inveigh—  
For I once had the same visions too!

### *Envoi*

Health and wealth and fame, then, undoled,  
Be yours, lad, whatever you do!  
Ah, what though I crumble to mould—  
For I once had the same visions too!

# MARRIAGE IN EARLY UPPER CANADA

BY THE HONOURABLE WILLIAM RENWICK RIDDELL



O those who from duty or curiosity have been led to examine the voluminous correspondence, official and private, of the early days of this

Province, it seems almost paradoxical to speak of the scarcity of paper in those days; but notwithstanding the early erection of paper mills, paper was scarce and dear. Good, it undoubtedly was, and with the finish due to handwork and rag material, for the invention of Robert did not make its advent in this Province till well on in the 19th century. This scarcity has been the cause of the preservation of records of great antiquarian and sometimes of historical value. For example, some of the records of the Court of Common Pleas for the Western part of the Province when Detroit was part of Canada, and the Judge lived there, have been preserved because the Clerk of the Court of King's Bench at York (Toronto) in 1828 wanted a book in which to keep the minutes of that Court, and utilized the blank pages of the old Record of the Court of Common Pleas for the District of Hesse.

Another and perhaps even more interesting record was preserved because the Clerk of the Peace at Kingston, in 1813, wanted a book in which to keep the records of the Court of General Quarter Sessions of the Peace in and for the Midland District, and

he utilized the blank leaves of an old Register no longer of use.

There were only four entries in the register; few as they are, they throw a flood of light on the state of affairs in the first years of the existence of the Province.

David McCrae swears before Richard Cartwright, junior, Judge of the Court of Common Pleas for the Midland District, May 29th, 1794, that he did publicly intermarry with Erie Smyth at Michilimackinac, October 13th, 1783, and he names, with the dates of their births, his living son William, and three daughters, Sophia, Frances and Amelia. Erie Smyth (signing her name in that way) swears to the same facts before George McBeath, Justice of the Peace at L'Assumption (now Sandwich) June 18th, 1794. Then "Richard Cartwright, junior, of Kingston, Esquire", swears before Thomas Markland, Justice of the Peace, May 30th, 1794, at Kingston, that he did publicly intermarry with Magdalen Secord at Niagara, "on or about" October 19th, 1784, and he names his living children James, Richard and Hanah; and Magdalen Cartwright swears the same at the same time.

At the time these marriages were contracted the French-Canadian law was in force not only at Niagara but at Michilimackinac—the English law in civil matters had been repealed by the Quebec Act in 1774, and by the



same Act the boundaries of the Province had been enlarged so as to take in all of what is now Ontario and the present Michigan. Marriage was in French Canada a matter of canonical law; to be a valid civil marriage there must be a religious marriage; and the decree of the Superior Council of June 12th, 1741, enjoined the curés to observe the canon law strictly in marriage. By the canon law a marriage to be valid required the presence of a priest. The English law was equally strict—at that time and for sometime after the presence of a clergyman of the Church of England (before the Reformation, of a priest) was necessary.

In the new country it was generally impossible to secure the presence of a priest of either communion; but Love laughs at locksmiths and at law.

Young people appealed to the principle of necessity which proverbially knows no law; remembering the fire-side law that the captain of a ship might perform the ceremony of marriage on his ship when on the high seas, they applied to the commanding officers of the military posts, to magistrates, to adjutants and even to surgeons at the posts acting as chaplains to perform the ceremony—and it was performed accordingly. Some of those so married took care on their return to civilization to have the ceremony regularly performed: for example Captain James Mathew Hamilton, whose descendants we yet have among us, was married at Michilimackinac to Louisa Mitchell, daughter of Dr. David Mitchell, Surgeon-General to the Indian Department there, the father performing the ceremony. On their arrival at Niagara they found the Rev. Robert Addison, a clergyman of the Church of England there and were remarried by him. The register (which was Mr. Addison's own but became that of St. Mark's Church) reads, "August 24th, 1792, Captain James Hamilton to Louisa Mitchell his wife. They had been married by some commanding

officer or magistrate and thought it more decent to have the office repeated". The Hamiltons were great favourites with our first Lieutenant-Governor Simcoe and his wife. The English law in civil matters was re-introduced in this Province in 1792 and it is dangerous to attempt to apply the doctrine of necessity to English law.

Richard Cartwright, junior, who had been appointed a member of the Legislative Council, was strongly impressed with the peril attached to these irregular marriages—his own was one of them—and he in the Second Session of the First Parliament in 1793 introduced a bill to validate all such marriages. This passed the Council without difficulty, but in the House of Assembly it was amended so as to authorize the ministers of other communions than the Anglican to perform the marriage ceremony for their own people. This amendment was not accepted—a conference was held by Cartwright, Peter Russell (afterwards Administrator of the Government of Upper Canada) and Commodore Grant (who died at a great age through his exertions in the war of 1812), representing the Council and Macomb, Campbell and Van-Alstine, representing the Assembly. The Commoners withdrew the amendments on the positive assurance that representations would be made to the Home Government in favour of non-Anglicans, and that the matter would be put on a liberal footing at the following Session.

The Act was passed and became law; it provided that all marriages theretofore contracted before any magistrate or commanding officer of a post, or adjutant, or surgeon of a regiment acting as chaplain, or any other person in any public office or employment should be valid. Persons who had contracted such marriages might preserve testimony by making within three years an affidavit in the form given, with the dates of the births of their surviving children, if any, and

these affidavits the Clerk of the Peace was to enter and record in a register to be kept by him for the purpose.

For the future until there should be at least five "parsons or ministers of the Church of England" in any District—there were then four Districts in Upper Canada—a magistrate might marry after having put up a notice in the most public place of the township or parish and waited until three Sundays had elapsed.

Simcoe did not like the Act. He loved and honoured his church only less (if less) than his King: he desired the establishment of the Church of England and was indignant that it should even be suggested that ministers of another church should have the power to marry. Cartwright, strongly attached to his own church as he was, could not think it wise to give to that Church the same exclusive advantages "in a community composed of every religious denomination where nineteen-twentieths were of persuasions different from the Church of Eng-

land". This was made one of the grounds for Simcoe's outrageous charge that Cartwright was a Republican—at that time in Upper Canada a sin of rather deeper dye than stealing and equivalent to a charge at the present time of being a pro-German and a leader of the I.W.W.

Petitions asking for an Act giving others the same rights as Church of England "parsons or ministers" were treated by Simcoe with lofty scorn; he said that he thought it proper to say that he looked upon the petition as the product of a wicked head and a disloyal heart: and it was not till 1798 when Simcoe had gone home that any measure of relief was given, and then only to the Church of Scotland, Lutherans and Calvinists. The clergy of nearly all churches received the power in 1830, and all in 1857; the Salvationists in 1896; but Methodists and Baptists felt the strong hand of the law before their communions were placed on a par with some others.





# SIMON GIRTY'S MARRIAGE

BY HON. WILLIAM RENWICK RIDDELL



N official entry in an old Register brings to mind a little known story of the days of the American Revolution.

From before the Declaration of Independence, July 4th, 1776, till after the Peace of Paris, September 3rd, 1783, the Ohio country was a place of peril. American soldiers, regular and irregular, harried those suspected of loyalty to the Crown, and British troops from time to time made incursions from Detroit and Michilimackinac. The Indians were divided, some were faithful to the Great Father across the Big Water, others, fearing the Long Knives, supported their cause, and some plundered all pale-faces indiscriminately.

The settlement of the country west of the Alleghanies, which had begun shortly after the close of the Seven Years' War in 1763, had not been seriously checked by the Revolutionary movement; on the contrary, some settlers were induced to make their home in the then remote West far from the Sea, to avoid persecution by one or the other faction.

Francis Malott of Maryland was one of those who sought the Far West; he took with him his wife Sarah and her children, to go to Kentucky. Overland to Fort Pitt (now Pittsburgh) they went; and at that Post, late in March, 1780, with others bound to the same country, they set sail down the beautiful Ohio formed there by the confluence of the Allegheny and Monongahela. There was a little

flotilla of three boats which kept together for mutual aid and protection. The exigencies of this primitive method of travel required that Malott and his family should be separated; his wife and children were placed upon a boat owned by a man named Reynolds. Malott himself went on one of the other boats.

The flotilla had passed down the river past the site of the present city of Wheeling, and was a few miles below Captina Creek, which still pours its waters through Belmont County into the Ohio on the right, when the dreaded Indians made their appearance.

Washnash, a well known Chief of the Munceys, with his band captured the Reynolds boat: Reynolds himself was either killed in the affray or tortured to death shortly afterwards: a little girl, his daughter, was shot, perhaps accidentally; and the remainder of the passengers on this boat, men, women and children, were taken prisoners; the other boats effected their escape with small loss, and made their way to Kentucky.

Among the prisoners was Catherine Malott, the oldest daughter of Peter and Sarah Malott, who was then a girl in her fifteenth year. She was taken by her captors to one of the Delaware Indian towns on the Scioto River, where, adopted into an Indian family of the Muncey tribe, she remained a captive for some years. About 1783 or 1784, the town was visited by the celebrated Simon Girty. Girty had himself when a boy of fifteen been captured by the Indians,



Delawares and Shawanese; he had lived with the Senecas for a considerable time, and had learned their language and customs. At the beginning of the American Revolution, he had taken the side of the Colonists; but had repented of his treason, and been imprisoned at Fort Pitt by the Colonial General. Making his escape from that place in March, 1788, with Alexander McKee and Matthew Elliott, two Loyalists both well and favorably known in later days in Upper Canada, he joined the British at Detroit. Thereafter he proved himself a faithful, diligent and useful servant of the Crown. As was, until but the other day, the custom of American historians to speak of all who took the Loyalist side, he had been branded as an unmitigated scoundrel, with less mercy than any Indian who gloated over the sufferings of unfortunate prisoners. In fact, he seems to have been much like the other western fighters; and his misfortune is that he fought for a losing cause.

Girty was a fine upstanding man, not far from six feet in height, with a large and striking head and large black eyes; from his Irish father and his English mother, he inherited many gifts of body and mind. Born in 1741, he was in 1783, a man of forty years, but he preserved all his youthful vigor and passion; he had not yet given way to the excessive use of spirituous liquor which cursed his last years.

Catharine Malott was now a young woman of eighteen of great beauty and charm; and it was no wonder that each was attracted to the other. Girty determined to make Catharine his wife, and at length he obtained her release from captivity. Some writers attribute her promise to marry Girty to her abhorrence of the life she led with the Indians and say that it was only upon the terms that he should procure her escape, that she agreed to marry him; but this is mere baseless and slanderous conjecture. Girty was handsome, attractive and

white; and we need look no further for any impelling motive—that Girty passionately and sincerely loved her, there can be no doubt.

In August, 1784, the two came out of the Ohio wilderness, and made their way to British territory where they might live together in peace. Girty had been promised a reward in land for his services; he went upon a tract of land now in the First Concession of the Township of Malden in the County of Essex which had been recently acquired by the Crown from the Indians, and there he took his promised wife. The Church of England missionary at that place performed the marriage ceremony and Simon Girty and Catharine Malott were husband and wife.

In after years she was compelled to leave him by reason of his cruelty toward her; when under the influence of liquor, which he drank to excess in his later years, he would beat her over the head with his sword. But when about 1816, he became blind, her woman's heart was softened: she returned to live with him at their son Prideaux' place, and solaced his last days until his death in 1818.

She claimed dower in certain land which he had owned in his lifetime; her right being disputed, it became necessary to prove her marriage.

The clergyman was dead and he had left no records, but fortunately the Legislature of Upper Canada (for an entirely different purpose) had provided a means of establishing such a marriage beyond any question. The story is a curious one.

The law of England allowed marriages to be valid only if celebrated by a clergyman, episcopally ordained; in many parts of the western country there were in early days no such clergymen, and young couples desiring to marry went before the Commander of a Military Post, or a magistrate, or even sometimes before a Military Surgeon, and such officer read the marriage service from the Prayer Book and pronounced the

couple man and wife. Man and wife they were in fact, but not in law.

When the first Parliament of the new Province of Upper Canada met at Newark, now Niagara-on-the-Lake, in 1793, two Members of the Legislative Council (the Honorable Alexander Grant and the Honorable Richard Cartwright), at least one Member of the Legislative Assembly (William Macomb, one of the members for the County of Kent), and the only lawyer (except the Attorney General) in the Province (Walter Roe of Detroit) had contracted irregular marriages of this kind—so had two out of the four English-speaking Justices of the Peace appointed for the Detroit county in 1788 by Lord Dorchester.

The Legislature was naturally anxious to legalize these marriages; and in 1793 a statute was passed which enacted that all marriages theretofore publicly contracted before any Magistrate, Commanding Officer of a Post, or Adjutant or Surgeon of a Regiment acting as Chaplain or any other person in any public office or employment should be valid, and that persons desiring to preserve the testimony of their marriage of this kind and of the birth of their children might at any time within three years file with the Clerk of the Peace of the District an affidavit of the facts, and that would be sufficient evidence. In 1818 the time was extended until 1821 for filing such affidavit, but Catharine Girty did not then take advantage of the Statute. In 1831, however, the

time was extended for six years, and now she was well advised. She accordingly appeared before William McCormick, J.P., at Colchester in the County of Essex on May 19th, 1832, and made the following affidavit:

"I, Catharine Girty, do solemnly swear that I did publicly intermarry with Simon Girty at the mouth of the Detroit River, now the Township of Malden, in the summer of the year of our Lord 1791,\* and there is now to me living issue of said marriage, viz.: Sarah, now the wife of Joseph Munger, born on the 18th day of April, 1792, and Prideaux Girty, born on the 20th day of October, 1796, and that such marriage was solemnized by Frederick Augustice Norstbaugh, Church of England Clergyman of the new settlement, now the Township of Colchester in the County of Essex and Western District of Upper Canada."

This affidavit being certified by Mr. McCormick, was registered in "Marriage Register A" by Charles Askin, Clerk of the Peace for the Western District, on October 24th, 1832; and Catharine Girty's status as lawful wife was conclusively established.

Thus an Act intended to validate irregular marriages became the means of proving one which was regular. Unfortunately her claim for dower failed on other grounds, for William Mickle had a perfect defence.

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\*In the affidavit the date 1791 is interlined; it is a clear mistake, not to be wondered at in a woman of sixty-seven, with no writing to assist her memory. Her first child, who died in infancy, was born in 1785, Ann, who afterwards married Peter Gouverneau, in 1786; Sarah, in 1791, and Prideux, in 1797. I have said nothing of the doubt entertained by some lawyers and others of the right of Church of England Clergymen to celebrate the marriage ceremony at that time in that County—this would involve the discussion of difficult legal questions quite foreign to my subject. After 1792, the right was undoubted, while marriages before that date were validated by the Act of 1793, the question, then, is purely academic. Another and less creditable explanation might be given of the date 1791. I do not pursue the inquiry.





# AN OLD-TIME MISOGYNIST

BY THE HONORABLE WILLIAM RENWICK RIDDELL



OMEN of the present age and perhaps more particularly those of this Continent are accustomed to the respect and deference of their men folk. In many parts of the world the rule is and always has been different; while in some countries, this respect is a matter of comparatively modern times and in most, is confined to those not of the lowest class.

In some of the countries of Europe in which woman has not even yet established a right not to be considered an inferior, she was for centuries spoken of by the upper and educated classes with respect. But there were exceptions; the monastic side of the Church and the Universities framed and conducted largely on monastic methods, never (except in very rare instances) looked upon women with favor. The brethren in the Monastery, the students in the Universities, allowed themselves full swing in the expression of their aversion to the fair sex. There are in existence many books of mediæval and later times, which testify to the lively imagination and wealth of vocabulary of these men.

It may not be without interest to give some account of one of these; and a comparatively late volume is selected.

I select a little Latin 16 mo, of ninety-six pages which was printed in Germany in 1644 (in the time of Charles I of England); it is a not unfair sample of the kind of literature referred to. Written in a light vein,

it is obviously "half in fun but whole in earnest"; and it repeats in a milder and more pleasant form, what had been the burden of previous solemn objurgation. The book is called "Hippolytus Redivivus" after Hippolytus a votary of the Virgin goddess, Artemis, who in the Greek story spurned the proffered love of his step-mother Phædra. The story is an unpleasant one even in the hands of "Euripides, the human with his droppings of warm tears".

The Latin is not very bad; although not Ciceronian, it is well up to the mediæval standard.

After a short "Permission to Print", the anonymous author addresses the reader thus:

"Here, gentle reader, you have depicted (rather poorly indeed) according to our judgment as in a painting, the genius of the female sex: if we have not exhibited it with uncompromising severity according to the truth—since it is easy in such a sink of iniquity to overlook some vices—let everybody supply from his own mind those wrongly omitted. We have used a style irregular and little polished; but the disorderly race of woman deserve nothing better—nor should anyone think me destitute of humanity in so bitterly demanding open and declared war against woman, since we are at enmity, and those of them who accept the truth will no longer displease however worthy of vituperation they may be at present."

The writer then proceeds:

"Of the feminine kind about to be considered it is necessary in the first place to explain the name and then the properties (or, if you will, the qualities). I may say at once to prevent man from unduly admiring this Pandora, that the

name of the first woman promised no good to them, and if one adopted the ancient Roman method and considered the name as an omen, she threatened the whole human race with disaster by her inauspicious and ominous name. He who gave names to the Universe was desirous of showing the wickedness of the female sex at 'the beginning of the world just as though He had actually used the word itself—for He called the first mother of all by the somewhat invidious but truthful name of Heva, either as much as to say that she would contract the greatest friendship with the serpent-kind (as she was the first to talk with the serpent), or what seems more probable, that she herself was of the serpent-race. For this word sounded with the 'h', thus 'Heva', means nothing else in Syriac according to Eusebius who says 'Heva, aspired, is the female serpent. . . .'

The Latin name "mulier" the author derives from "mollior" i.e. "more loose in life"; he thinks it not necessary to discuss the Hebrew name, which means nothing else than "oblivion"—for, as he sagely remarks, "An argument from etymology can result, only in probability not in certainty."

"After a description of the name, the proper order is to define the thing itself, although indeed I would rightly be considered crazy if I should seek order in that which is in the highest degree disorderly—in what I am about to say. I do not know what I shall say, or why—the mind whirls, the pen trembles, conceiving that nothing so bad can be said about woman but worse remains to be said".

And this is how he says it:

"Woman, fed by Megaera, born of Tisiphone, into whose mouth Alecto dropped milk, is total shipwreck, a tempest in the house, a hindrance to peace, the captivity of life, a daily injury, willing for battle, a costly war, perpetual complaining, frequent passion, domestic punishment, unbridled jealousy, a constant liar, a shame-

less beggar, a beast of a guest, brazen disquiet, boldly quarrelsome, a made-up face, alluring form, artificial complexion, painted cheeks, tortuous vision, poisoned eyes, wasteful disposition, drooped shoulders, raised bosom, thin flanks, petulant words, fondling and caressing deceit, wheedling speech, simulated sighs, a serpent of pious breed—of tearful smile, discordant society, faithless companion, a hungry Aetna, secret disgrace, a filthy bedmate, an outrageous expense, an incalculable yoke, a piece of hell, a sulphur match, mercurial instability, a trouble to the timepiece, a wicked animal, a devouring lioness, a decked-out Scylla, three-headed Cerberus, fire vomiting Chimaera, terrible Charybdis, dog of the sea, glaring Harpy, thirsty Hydra, Theban Sphinx; a noxious breed, the vicar of Satan, the door of Hell, way of iniquity, stroke of the Serpent, kindled fire, lash of conscience, enemy of friendship, inescapable punishment, tempting of nature, a calamity though longed for, a domestic peril, hurtful though delightful, a snake in the bosom, an amatory noose, tinder to fire the passions. . . . a necessary evil, short joy, long hurt, an eternal contention—woman the cause of all evils."

(I leave out the coarser epithets—and there are plenty of them.)

One rather wonders what the author imagined he had left for his readers to supply.

The remainder of the book consists in great measure of special instances of depravity in woman, illustrated by apt quotations from Greek and Latin authors—and it must be said that for the author's purpose, the passages quoted have been well selected.

It may serve in some degree to illustrate the advance made by woman toward obtaining simple justice, to say that in no modern country with any claim to civilization could such a book now be published even in "the decent obscurity of a learned language".



# How Englishmen Once Came to Toronto

*By*

Hon. William Renwick Riddell



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# HOW ENGLISHMEN ONCE CAME TO TORONTO

BY HON. WILLIAM RENWICK RIDDELL



FEW Canadians of the present day have any idea of the difficulties of travel eighty years ago. An Englishman who can leave London and be in Toronto within a week may be interested to know how a compatriot performed such a journey in 1832.

A graduate of Oxford of some means determined in that year to try his fortunes in the West and selected Upper Canada as the scene of his experiment. He on his return to England late in 1837 wrote and published a little 12mo. cloth bound, volume of 126 pages of his experiences in the Colony — “Six Years in the Bush or Extracts from the Journal of a Settler in Upper Canada, 1832-1838”.

He left Liverpool, April 10th, 1832; and such was “the regularity and despatch of the New York and Liverpool packets”, that on the thirtieth day after departure from England, the ship came safely to anchor in the harbor of New York. This would not now be considered satisfactory speed: but it must be remembered that the first steamship to cross the Atlantic by steam, the Canadian *Royal William*, did not cross until 1833, and the first steamship to be launched for the trans-Atlantic trade, and the first made ready for sea in England, did not take the water till 1837: the *Great Western* in the Avon.

In those days it was not unusual for a sailing ship to take two, three or even four months to cross the Sea, and a trip occupying only thirty days was to be rather wondered at.

We are not here concerned with the City of New York, its magnificent Broadway, its Washington Hotel, where the visitor sat paralyzed at the astonishing rapidity with which the viands disappeared, and its other wonders—our author wanted to get to Canada. He did not take the New York Central or the Hudson River Railway—these were some distance in the future—but he embarked on board a steamer for Albany. Nine hours sufficed for “this once adventurous voyage, formerly undertaken by few without prayers for their safe conduct being offered in the churches by friends at home”—surely an exaggeration or a joke on the Englishman by his fellow travellers.

Leaving Albany with its fine public buildings, its excellent shops and its rapacious store-keepers—but then you should “never give a store-keeper in the United States more than two thirds of his original demand”—he crossed to Schenectady by railroad—the first railway in the State of New York, the Mohawk and Hudson opened the previous year, and of which the original station at Schenectady is still standing or was the other day.

Then, came another change—this time to the packet boat which was to

carry him from Schenectady to Syracuse at the rapid rate of five miles an hour, travelling night and day, the motive power being supplied by three horses. As the packet was crowded, our Englishman thought it expedient to establish himself on deck for the night although the rest of the passengers went below to a small cabin fitted up with sleeping berths. He soon found his mistake, for the blood-thirsty mosquitoes discovered him, and the chorus of frogs gave him "a more distinct conception of the terribleness of the frog plague upon Pharaoh and his Egyptians". To complete his discomfort, a cold drizzling rain set in, wetting him to the skin, so that he had to agree with his fellow travellers who left their snug berth at sunrise, and guessed "that the young Englisher would have done better below".

Landing at Syracuse, he was transferred to another boat, this was on the Oswego Canal, which joins the Erie Canal there. He was carried through Onondaga, "celebrated for its extensive salt mines", to Oswego which was reached before nightfall.

There a Kingston steamer received him on board in company with a travelling menagerie and its keeper (*cheu fugaces labuntur anni!*) and, May 23rd, brought them safely to Kingston "where everything denoted that we were once more under our own King's sceptre, British colours on the Fort, British Uniforms on the streets and the old familiar signs on taverns, the King's Army, the Queen's Head, the crown and Anchor". There he saw the mouldering hulks of those threatened Leviathans of the Lake, the *St. Lawrence* and the *Psyche*, each pierced for 250 guns—which had become useless by the Peace of Utrecht, 1814, and the Rush-Bagot Convention of 1817. The *Psyche*, cut out in the rough, then sent to England to be shaped, was sent back to Kingston to be finished at a total cost to Britain of a million sterling. He does not fail to state—no one

writing of the *Psyche* ever does fail to state—that although she was intended to sail on fresh water, she was fitted out with an elaborate and costly apparatus for distilling salt water to supply fresh, in addition to a vast number of water casks.

May 25th, he embarked at Kingston on board the steamer *Great Britain* for "York Town or Toronto as it is now more wisely called"—it did not receive statutory authority for the change until 1834, but the name "Toronto" was in common use, "Little York" or "Muddy York" being considered by the citizens somewhat derogatory to the splendid metropolis, the Capital of the Province.

Toronto "lies low and its first appearance from the water was depressing"; but he found that "though extremely irregular and unfinished, the streets contained several good shops and private houses, some handsome public buildings, and a certain air of bustle and importance"—and one could not ask more than that from an Oxford man.

We must omit as not relevant to our purpose his trip to Niagara Falls by steamboat and carriage, to St. Catharines where he met a surly and insolent innkeeper, to "Hamilton a thriving little town at the head of Lake Ontario", to Brantford and Oxford (Woodstock), "to the radiant shores of Lake Erie", where he shot some wild pigeons and his friend "beguiled some miserably small trout out of a distant stream", to "Colonel Talbot at his thriving settlement at St. Thomas", to London "*et olim parvula Roma fuit*", back to Toronto, where he found "Cholera raging so fiercely that all business was at an end". Then by wagon on Yonge Street to Lake Simcoe, through Newmarket where he lunched with "Mr. R., M.P.P." (William Benjamin Robinson, Member of the House of Assembly for Simcoe)—back from Lake Simcoe to Toronto where the cholera still raged, then to Cobourg "a small but rapidly increasing town", to



Percy on the Trent, to Rice Lake, then by boat to Peterborough.

He bought 3,000 acres of land in Verulam Township and farmed for some years, built a sawmill and in September, 1837, he made up his mind to return to pass a few months among his friends in England. He left Peterborough down the Otonabee, across Rice Lake, by wagon to Cobourg passing Amherst (now "the Court House" in Cobourg) where he had served on the Grand Jury for the District of Newcastle; thence by steamboat to Rochester, canal boat to Utica, railroad to Albany, steamboat to New York and packet to Liverpool—"a leading wind wafted us merrily across the Atlantic and on the eighteenth day from leaving New York our gallant bark dropped anchor in the crowded waters of the Mersey".

The cost of the journey from any part of England within a moderate distance of Liverpool to Toronto should not exceed £40 including food, bed, etc. He gives the expense of his return trip thus—

Fare from Peterboro to Co.	£.	s.	d.
bourg .....	0	10	0
Steamboat to Rochester.....	0	7	6
Canal Boat to Utica .....	1	10	0
Railroad to Albany .....	0	7	6
Albany to New York .....	0	2	6
Two days' detention at New			
York .....	1	0	0
Fare to Liverpool .....	30	0	0
<hr/>			
Total.....	33	17	6
Say \$135.50.			

Any Canadian would be loath to leave this little book without saying something of the author's account of the Lieutenant-Governor Sir John Colborne, the Chief Justice (not yet Sir) John Beverley Robinson and his Court at Amherst, "conducted after the English fashion and with equal dignity", the Mohawk and Chippewa Indians, the Methodist Missionaries and Long Point where "the lake supplied us with fish of various kinds, the marshes with wild fowl and snipe, the cleared land with quails and the woods with partridges, wood-grouse, black squirrels and an occasional wild turkey, the summer duck was frequently shot . . . and sometimes . . . a wild swan. . . . the shallows tenanted by the patient spectre-like heron", and the farmers begged him to come and shoot the flocks of wild turkeys which were destroying their corn.

When we know that he had letters of introduction to Sir John Colborne, that he bought a large tract of land in Verulam, that he was visited by Sir John Colborne in 1834, and that he was in 1833 appointed a Commissioner for the improvement of the inland navigation for the Newcastle District, there is no difficulty in piercing his anonymity: but we may here respect it.

This Englishman knew what many Canadians have not yet discovered—that "Canada is a land of dreams, and what seems a 'baseless vision' one day is a reality the next".



A  
RENAISSANCE MYTH

BY  
HON. WILLIAM RENWICK RIDDELL



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# A RENAISSANCE MYTH

BY WILLIAM RENWICK RIDDELL



TO what extent the myths of the poets of classical times were mere inventions of the authors cannot be said with certainty, but it seems reasonably clear that many of the marvels of Ovid's *Metamorphoses* were the common property of the people, although some were really of his own manufacture.

In the revival of scholarship, known as the Renaissance, the myths of ancient Greece and Rome received as much attention as the remainder of classical learning, and some of the poets of Italy imitated the older poets in inventing myths, because they could not discover myths already made and still awaiting literary expression.

A striking example of this was Girolamo Fracastoro (Latinized, Hieronymus Fracastorius) of Verona, 1483-1553, a physician, mathematician, astronomer, poet, Latinist, all of the first rank. He wrote in Latin, prose and poetry, the latter in dactylic hexameter and elegiacs. In his poems he more than once created a myth, all of them in more or less close imitation of those in the older writers.

In his first published poem, Verona, 1530, (on the *Morbus Gallicus*) he gives the story of the young hunter, Ilceus, who was cured of a loathsome disease by the Nymph Lipare who took him into her subterranean grotto and bathed him in liquid silver. This was an imitation of the story

of Aristaeus as given by Vergil in the fourth Book of his *Georgics*.

A more ambitious effort at myth-making, however, is to be found in his *Carmen* to Joannes Matthaeus Gilbertus, Bishop of Verona—a dactylic hexameter of eighty-two verses.

The Ode begins with a gift to the Bishop of "golden apples which once upon a time, Atlas brought from the confines of Media and kept safe under the guard of a mighty dragon—but later, the victorious Perseus despoiled the garden and when he crossed Italy in the air with his winged heels, he gave the apples to Charite the Nymph of Benacus" (now Lago di Garda, near Verona). This is not the only gift, however; the poet sends also some fish, "which formerly were Etruscan sailors in our image but now, swimming under the whirling waves, sweep through the blue water with their waving tails".

The story is given ostensibly as told by Battus, i.e. Joannes Baptista Turrianus of Verona, who was an intimate friend of Fracastoro and to whom Fracastoro wrote several Odes of high quality.

When Saturn was driven by Jupiter from Crete he sought a quiet resting-place in Italy. One day when the sun had crossed the meridian he saw some sailors resting on the grass by the crossing-place of Benacus and mixing large cups of pure wine. Saluting them with kindly face, he asked if they would help a needy and weary old man and would give him a small cup to quench his thirst. The



sailors laughed at him—"who can be thirsty, so much water being at hand? You can drink your fill from this flood and allay the heat with cold water". The derided god lay down by the water side and drank from his hands, then turning to them, he asked how much they would charge to row him to certain rocks surrounded by the water of the lake and forming a small island in the waves. They asked an exorbitant figure; but the bargain was made and the gods were called upon as witnesses. He boarded the boat (*phaselus*); and when it had got out into the lake, the sailors, ignorant that they carried a god, said, "Come now, old man, tell us for what crime you are seeking a hiding-place; are you not running off with stolen gold to some place of safety? You fool your fate will follow you, no hiding-place can save you." *Carpus* was the name of the spokesman, but the rest joined in; and they demanded the gold, the stolen gold, to be given to them, threatening to take it by force and to throw him into the water. The god tried quietly to placate them, and reminded them of their contract made with the gods as witnesses—but they began to lay hands on him. Then he, who now could be recognized as a god, said: "You impious crew, enemies of the gods, you will get the gold you are demanding—there at the bottom of the water, you, greedy of gold, will feed on it." They implore forgiveness, their voices fail, they see themselves becoming dumb and their mouths broaden into a patulous grin, their hands go off into fins, their clothing hardens into scales and their feet twist into a tail—the pallor caused by sudden fear remains; but as indicative of their iniquitous ill-will, their bodies are suffused with black drops. *Carpus*, who first insulted the god, was the first to give himself to the waters and hide in the lowest depths—then the others leaped quickly into the midst of the flood and left the boat empty and without oarsmen.

Now the god was left alone, and he sought the farther shore of the lake himself; then turning to the waves he said: "O Nymphs of *Benacus*, may this boat remain, this unhappy keel plough the sacred stream and your waters. In truth they will forever remain on this rock as monuments of this crime." He spake; and, turned into a portion of the rock, the boat hung with its oars where even now can be seen the shells which the wretched sailors had gathered from a foreign shore and placed in the bottom of the boat; and it is for this reason that the fish which to this day retain the name of *Carpus*, swimming along the shore of *Benacus*, feed upon the veins of gold at the bottom.

This is, of course, a conscious imitation of Ovid's story in the Sixth Book of the *Metamorphoses* (*Fabula IV. vv. 313-381*).

*Latona* fleeing the wrath of *Juno* and carrying in her bosom her twins *Apollo* and *Diana* born on *erratica Delos* . . . *invita noverca*, came to *Chimaera*-bearing *Lycia*. One day, wearied by long and strenuous exertion and heated by the burning sun, she saw in the lowest valley a lake of pure water. The rusties there were gathering osiers and sedges; and forbade her to drink of the cold water. The favorite of *Jupiter* in vain protested. "Water is for the use of all. Nature does not make the sun or the air or the waters private property; these are for the public. I do not desire to bathe or wash but to relieve my thirst; my mouth is dry, my throat parched; I can hardly articulate. A drink of water would be nectar; it would give me life. Let these little ones move you, holding out their tiny hands from my breast." In vain, the babes held out their hands; the prohibition continued; vile threats were added. That was not enough for the yokels—they stirred up the water with hands and feet so that it became foul.



Anger drove out thirst. Latona, stretching her arms toward heaven prayed, "May you live forever in this muddy pond." Her prayer was granted; changed to frogs they hastened to hide themselves in the waters, sometimes to be completely submerged, sometimes to protrude the head, sometimes to swim in the deep water, often to sit on the bank of the pond, as often to leap again into the flood. And now they utter filthy threats, their voices hoarse, their necks swollen, the back joined to the head so that the neck seems absent, the back green, the belly—the greatest part of the body—white. And ever new frogs leap into the muddy deep.

The reference by Fracastoro to the fossil shells still to be found on Lago di Garda and to the foreign shells brought by the sailors from abroad is in the true mythopoetic spirit. But it is recorded that when in 1517 the builder of the Citadel of San Felice at Verona found fossil mussels in the rocks, he took the same view as Leonardo da Vinci, "very advanced for those days, that they were the remains of animals once capable of living in the locality".

The ship changed to stone still ploughs the waters with its ill-omened keel for the Sirmio of Catullus, *Sirmio, peninsularum insularumque ocellus*, the very jewel of all peninsulas and islands, still runs boldly into the waves from the south shore of stormy Benacus, and it requires no great imagination to see the ship hanging on the rock "an eternal monument of this crime".

Benacus is as lovely and blue as

when Catullus looked out upon it from his country seat on Sirmio, and has waves as fierce as when Virgil addressed it *fremitu adsurgens Benace marini* — Benacus surging with ocean roar.

The blasphemous Carpus has innumerable descendants in the Carpi-one, known to all the French (except the Academy) by the name of Carpion, to ichthyologists as Cyprinus Carpio, to us as the Carp, (which shares with the Trutta, the Lagone and the Cardene, the Alpine Lake) The guides and guide-books sometimes call it a salmon-trout. Though not unlike, no one would call it by that name who ever tasted a salmon trout from Lake Ontario. Science agrees that it was not originally a native of these waters but it does not agree that the origin is as given by the poet. It insists that the Carpi-one indigenous in Asia and possibly in south-eastern Europe did not reach alpine waters till the twelfth or thirteenth century. We all know that Saturn had passed away long before that time and even Great Pan was dead.

But Carpi-one feeds on mud as well as grass and grains and still swallows gold in the mud. *imo sub fonte*—no more useful to it in that than in any other form; and it still has the body "suffused with black spots, indicative of the malevolence" of its eponymous ancestor, and the white face indicative of his fear.

Opinions may vary but, *me judice*, the myth is as charming as any Ovidius Naso ever wrote and the Latin as good.

# WHEN HUMAN BEINGS WERE REAL ESTATE

BY HON. WILLIAM RENWICK RIDDELL



THE Common Law Villein who, Blackstone says, Comm. Bk. II. p. 92, had "a kind of estate superior to downright slavery but inferior to every other condition", has been thought to be the only person in a servile condition in early England. But the researches of Vinogradoff and others have conclusively established that in addition to Villeins, there were real slaves, the personal property of their masters and bought and sold as freely and effectively as so many cattle. Villeins were real estate and descended to the heir; slaves were personal estate and did not so devolve.

Slavery as such in England died out; villenage regardant was considered to have been abolished by the Statute of Tenures (1660) 12 Car. II., c. 24, although the reasoning in that regard of Lords Talbot and Hardwicke cited by Lord Mansfield in *Somerset v Stewart*, (1772) 1 Lofft. 1, will scarcely recommend itself to the modern lawyer. It was decided by the Court of King's Bench in that case that slavery (including villenage in gross) was not allowed or approved by the law of England. It was, however, admitted on all hands that from necessity, slavery was legal in the American Colonies and that there slaves were "goods and chattels . . . saleable and sold".

This status of personal estate "goods and chattels" seems to have been changed by statute. The Act of 1732, 5 George II, c. 7., enacted by

sec. 4 "that from and after the . . . 29th September, 1732, the Houses, Lands, Negroes and other Hereditaments and real Estates situate or being within any of the . . . Plantations.... (in America) should be liable to be sold under execution. Personal estate has always been liable to sale under the Writ of *Fieri Facias*; and the Act of 1732 was passed to subject real estate to the like liability in the American Plantations, a liability to which it was not and is not subject in England. This Statute was the origin of our Ontario "*Fi. Fa. Lands*", and it may be remembered that the first reported case in Upper Canada, *Gray v Wilcocks*, was a decision on the question whether land could be sold under *Fi. Fa.*

The Statute of 1732 recognized Negroes as Hereditaments and real estate in British territory in North America.

A number of conveyances, copies of which have come into my hands, show that this status of the Negro slave was generally understood by the profession. E. g., one William Gilchres (Gilchrist) of Vermont, conveyed a mulatto named Dick in 1786 by a deed of Bargain and Sale in the following terms:

"Thuserry octrs 19, 1785.

"Know all men By these presents that I William Gilchres in the County of Rutland and State of Vermont, Yoeman for and in consideration of twenty pound Law Money to you in hand paid by Joseph Barrey of Richmond in the County of Cheshier in State of New hampshier yeoman whereof I



acknoledg the receipt and bargained and sold one molate Boy six years old naimed Dick unto him the said Joseph Barrey and his heirs for ever, to have and to hold the said molater boy, I said William Gillchres who for myself and my heirs promise for ever to warrant socure and defend said promise against the lawful claims or demand of any person or persons in which I have set my hand, hereunto, and seal this nineteenth day of October one thousand seven hundred and eighty-six, in the eleventh year of endipendency.

(Signed) William Gillchres

Signed, sealed

in the presence of us

(Signed) Elisha Fullan

Lucy Yeomans.

Had the "molate" been considered personal property the conveyance would have been to Joseph Barney, his heirs, executors, administrators and assigns, as in the case of the next conveyance. I copy:

"Before the underwritten Notaries residing in the City of Montreal in the Province of Quebec, duly admitted and Sworn personally came and was Present Jean Louis Cavilhe of the Saint Laurence Suburbs Merchant, who voluntarily declared That for and in Consideration of the sum of Fifty six Pounds Lawful Money of the Province aforesaid to him in hand paid by James MacGill of said Montreal, Esquire at or before the Executing hereof the receipt whereof is hereby Acknowledged to have bargained, Sold, released and confirmed and by these presents doth Bargain, Sell release and Confirm unto the said James McGill a Negro woman named Sarah about the age of Twenty five Years To have and to hold the said Negro Woman named Sarah unto the said James McGill his Executors administrators and assigns forever, and he the said Jean Louis Cavilhe his Executors administrators and assigns, and against all and every person or persons whatsoever shall and will warrant and for ever defend by these presents, of which Negro women He the said Jean Louis cavilhe hath put the said James McGill in full possession by delivering her up to him. Thus done & passed at Montreal, aforesaid on the twenty third day of September in the year of our Lord one thousand seven hundred and eighty-eight and Signed by the said Jean Louis Cavilhe after being duly explained unto him in French by one of the said notaries, and by us Notaries.

(Signed) Cavilhe

J. G. Beek

1788

Not. Pub."

The conveyance to the Grantee his Executors, Administrators and as-

signs, shows that the property conveyed was considered personal property.

By the French Law, slaves were always personal property; but even after the Quebec Act of 1774 which re-introduced the former French law, slaves were sometimes considered as real estate by the English inhabitants of the Province of Quebec. For example, James McGill of Montreal, in 1784 makes the following Bargain and Sale:

"To all to whom these presents shall come I James McGill of the City of Montreal in the Province of Quebec Esquire for and in the name of Thomas Corry of Lassomption in the said Province Merchant being thereunto Authorized by him; Send Greeting; Know ye that I James McGill in the aforesaid name of Thomas Corry for and in Consideration of the Sum of One hundred pounds of the present Lawful Currency of this Province to me in hand paid by Salomon Levey, of the same place Merchant at or before the sealing and delivery of these presents the receipt whereof I do hereby acknowledge. Have bargained Sold and Granted and by these presents do bargain Sell & grant unto the said Salomon Levey, a Negro man named Caesar and Negro woman named Flora.

"To have and to hold the said Negro man named Caësar & negro woman named Flora by these presents bargained sold and granted unto the said Salomon Levey his heirs and assigns for ever freely quietly, peaceably and intirely without any contradiction, claim, disturbance or hindrance or any person or Persons whatsoever, and I the said James McGill acting for said Thomas Corry and in his name and behalf for himself his Heirs and assigns the said negro man named Caesar and negro woman named Flora, unto the said Solomon Levey his heirs and assigns against him the said Thomas Corry his Heirs and assigns, and against ail and every other person or persons whatsoever shall and will warrant and for ever defend by these presents of which two Slaves above named he the said Thomas Corry has put the said Solomon Levey in full possession before the Selling and Delivery thereof.

"In witness whereof I the said James McGill have hereunto Subscribed my name and affixed my Seal at Montreal aforesaid this Sixteenth day of December one thousand and seven hundred and eighty four.

"Sealed and Delivered in the presence of

(Signed) James McGill

(Signed) J. G. Beek.

Not. Pub."



That the same rule applied in Upper Canada will appear from a Deed by Eli Keeler of the Township of Haldimand in the County of Northumberland to William Bell of the Township of Thurlow in the County of Hastings "his Heirs and Assigns" in March 1824 whereby he give, grants assigns and sets over for ten years a "Melatto Boy named Tom" (1 Papers and Records, Lennox and Addington Hist. Socy. Napanee, 1909, pp. 41, 42).

To show some of the incidents of slavery, I subjoin the copy of a letter concerning a "Negro Wench named Sarah" in 1785:

Saratoga 2 Feby 1785

Dr Sir

I send by John Brown a Negro Wench Named Sarah my Right & Lawfull property —which you will Pleas Dispose of with the

advise of your friends. I have wrote Mr. Thomson on the same subje<sup>t</sup>—she has no fault to my knolage She will not Drink and so fare as I have seen she is honest—many many opportunities she has had to have shown her Dishonesty hat she been so in Clined - I am sorry to give you the trouble—She cost me sixty five pounds should not Lick to sell her under.—

Should you not be able to get Cash you may sell her for furs of any Kind you think will suit our market and send them down By the Return sledges; any trouble you may be at shall Pay for these.

I am Dr. Sir. Yours as hurede friend &c:

Hugh McAdam.

Mr. Morrison

mercht. Montreal.

Morrison by letter of March 9th, 1785, informs McAdam that he has sold Sarah to Charles Le Pailleur, Clerk of the Court of Common Pleas for £36 currency (£32-8-0, sterling, say \$160).



# The Mosquito in Upper Canada

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL,  
LL.D., F.R.S.C., ETC.



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## THE MOSQUITO IN UPPER CANADA.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., F.R.S.C., ETC.

The Insect has been called the "Outlaw of Creation;" and some have not hesitated to say that the great fight ahead of man is with the Insect, and that if he does not conquer the Insect, it will conquer him and civilization together.

Whatever truth there may be in these somewhat alarming statements, there can be no doubt of the tremendous amount of misery and mischief done by some kinds of insects. And the mosquito is not the least noxious. Her activities are almost as varied as the methods of spelling her name; Murray gives twenty-six spellings and the mosquito has at least a score of ways of being a nuisance.

All writers on early Upper Canada agree in their account of the extraordinary number of mosquitoes in that new land;—apparently the Arctic regions in the summer are the only places which could be cited as a rival in that respect. Dr. Howison who spent a few years in this Province in the second decade of the last century tells of visiting the Gaelic settlement in Glengarry, and says that on going up to his bedroom at that place the moment the door was opened a cloud of mosquitoes and other insects settled on the candle and extinguished it. While such an occurrence must have been unusual, every one who lived even half a century ago in rural Ontario must have seen swarms not much if at all less thick. The "rain barrel" without which the farm mistress could not do her washing was placed at every corner of the house and almost invariably was full of "wrigglers" or baby mosquitoes, larvae. Offensive as the mosquito was and is, her music annoying, her bite irritating and poisonous to man and beast, until recently she was not blamed for more. And yet it is quite certain that what we now call malaria is due to the mosquito. In olden Upper Canada, fever and ague, ("fevernager" was the common pronunciation,) remittent fever or "fever of the country," was an almost intolerable curse. The cause was generally considered to be the bad air of swamps or low lying undrained lands, and if one here and there suggested the mosquito as the real offender he had no hearers. It was not until the closing years of the 19th century that it was scientifically established that the real cause is a very minute parasite in the blood and introduced by the *Anopheles* mosquito—that kind of mosquito which stands on a window pane with the proboscis and body in a straight line at an angle and not parallel with the surface, and "the female of the species is more deadly than the male."

The *Anopheles* has been busy in this Province ever since it was a province and it would be impossible to set out all her deeds. We shall speak of only two or three.

After the foolish and fratricidal war of 1812 had been waged for two years and a half, the contending parties agreed to quit as they began. By

the Treaty of Ghent they also agreed to refer to two Commissioners, one appointed by each party, the determination of the middle line of the international waters which was the boundary agreed upon in the Treaty of 1783 (which acknowledged the independence of the United States.)

General Peter Buel Porter, who had served with some credit in the War of 1812 and who was to be Secretary of War in Adams' Cabinet, was selected as the American Commissioner, and John Ogilvy of Montreal, the British Commissioner. Their duties led these men into the St. Clair Flats where the deadly Anopheles swarmed. Porter survived the attack, but Ogilvy, bitten by the insects, was stricken with fever and died at Amherstburg, September 28, 1819, the doctors all attributing the fatal infection to the miasmatic air of the lowlands.

A little before the St. Clair mosquitoes plied their deadly beaks on John Ogilvy, their sisters were busy with equally nefarious if not equally fatal work at the other end of the peninsula.

In June, 1817, there entered the Province of Upper Canada a Scotsman over whose head forty winters had passed and who was to become almost by chance one of the most noted men in our whole Provincial history. Robert Gourlay—he later adopted his mother's maiden name "Fleming" as a middle name—was born in Fifeshire of a moderately wealthy family; he devoted himself to farming but quarrelled with almost everyone but his devoted wife and children. Well educated, a man of good principles, honest, generous, ever mindful of the poor, he had peculiarities which were sometimes not far removed from insanity; he seems always to have been anxious to put some one in the wrong, not for any advantage to himself but for chastisement of the wrongdoer; he quarrelled on trivial pretexts with his neighbour the Earl of Kellie, his landlord the Duke of Somerset and several of his friends. At length he made up his mind to come to Upper Canada where he had land. He did not intend to remain more than six months, but purposed to return to his farm in Wiltshire. But *l'homme propose*; he visited his wife's kinsman, Thomas Clark, at Queenston in July 1817 and there he was laid up for two months with a fever caused by the stinging of mosquitoes. This misfortune entirely ended his plan of a speedy return to England.

He had sent out printed enquiries to various parts of the Province; and had received certain answers as to the state of the various townships.

Gourlay remaining in the country published an Address to the Resident Land Owners of the Province, advising the drawing up of a full statistical account of the Province and for that purpose the holding of meetings throughout the country to draw up answers to questions which he framed. The last of these attracted most attention: "What in your opinion retards the improvement of your Township in particular or the Province in general and what would most contribute to the same?"

Gourlay most emphatically states—and apparently with perfect truth—that he did not intend Parliamentary Reform and that he had no political object in view; he published the address in the official organ of the Government, the Upper Canada Gazette, after having consulted the Administrator, the Chief Justice and many of the leading personages of the little capital. Only one Councillor saw anything wrong in the Address; the Reverend Dr. Strachan as soon as he saw it in print, considered it of an inflammatory and dangerous nature. Gourlay was annoyed and angry. He took no pains to be conciliatory but rather the reverse, he wrote articles in the Press which aggravated his



supposed offence and confirmed Dr. Strachan's bad opinion of him. The view spread amongst the official classes, and it was spread by them that Gourlay was seditious and desirous of overturning the existing order of government and society; he was even charged with being pro-American, an imputation at that time quite as serious as that of being a pro-German at the present.

There is no reasonable doubt that both Gourlay and Strachan were perfectly honest; both desired the best advantage of the Province; both were Scots, both "dour," both fixed in their views—what one's enemies call stubborn, one's friends, firm—both intolerant of opposition and both of perfect courage of conviction. The contest for awhile lay between these two implacable countrymen, the divine suspecting the farmer, the farmer despising the divine.

But Gourlay could only talk and write; Strachan could act. In a short time the Province was stampeded, the Legislature forbade certain meetings which had been projected to carry out Gourlay's scheme, and the patriotic and philanthropic Gourlay was branded all over the Province as a traitorous self seeking intruder.

Prosecuted for seditious libel at Brockville and at Kingston, he was twice acquitted but there was a weapon in the existing law more effective than the law against libel.

In 1804 owing to the large number of disaffected Irish who were entering the Province, a Bill which had been at first intended as a protection against Americans hostile to our monarchical system was enlarged in its passage through the Legislature to cover the case of British subjects as well. As finally agreed to, it authorized certain officials, Judges, Executive and Legislative Councillors and others—to cause the arrest of anyone who was not an inhabitant of the Province for six months or who had not taken the oath of allegiance, and if not satisfied with his words or conduct to order him to leave the Province—if he did not leave the Province within the time given he could be tried for so doing and if found guilty he could be again ordered to leave the Province. If he disobeyed he was liable to the death penalty "without benefit of clergy."

This Statute had seldom been appealed to but it was in full force when the enemies of Gourlay failed in their prosecutions of him for seditious libel. Two magistrates of Niagara had him arrested; he was ordered to depart from the Province; he refused and was cast into the Niagara Jail to await his trial at the Assizes. In the Fall of 1819 he was tried and convicted; ordered to leave the Province, he passed through the State of New York and the Province of Lower Canada for the Old Land.

There oscillating between England and Scotland he remained for nearly fourteen years, three of them in prison because he refused to give bail when required; he horse-whipped Henry (afterwards Lord) Brougham in the Lobby of the House of Commons because (as he claimed) Brougham had neglected a Petition which Gourlay wished presented to the House of Commons; he worked on the road as a pauper; he showered petitions on the House of Commons, the House of Lords, the King; he drew up plans for the improvement of Edinburgh, for the settlement of New York State, and had the luxury of law suits both in the English and the Scottish Courts—and at length in 1833 he returned to this continent. He refused William Lyon Mackenzie's advances but ultimately returned to Upper Canada in 1838. From that time

on, the "Banished Briton," as he called himself, kept pestering the Provincial Parliament with petitions about his wrongs and demanding an admission that he had been wrongly banished. At length he was given a small pension which he refused and a pardon which he protested against; he lived in Upper Canada, the United States and Scotland until 1863 when he died in Edinburgh.

Gourlay is one of the most striking figures in our whole history: he just failed of being a great and a useful man; his prosecution which, while within the law, was really persecution, had some influence in uniting the forces opposed to "Family Compact" rule, although he himself always despised Responsible Government.

If the mosquitoes had let him alone, he would doubtless have returned to his English farm and quarrels with his landlord and his neighbours, and the world would have never heard of the Banished Briton and Neptunian.

The next victim of the Anopheles—which word, by the way, means in Attic Greek, worthless or injurious—to be mentioned is a dignified Judge of His Majesty's Court of King's Bench for the Province of Upper Canada—the Honourable Levius Peters Sherwood, the son of a Loyalist father who in 1784 came to Upper Canada with his family and slaves, locating about two miles below Prescott in the Township of Augusta. Levius Peters, the second son, joined the Law Society of Upper Canada in 1801, being the second Student at Law on its Rolls: he was called in 1803, and soon attained eminence at the Bar. He was a Member of the Legislative Assembly for Leeds in the Sixth and Eighth Parliaments and Speaker in the latter; he was a consistent and active supporter of the Government and after being Judge of a District Court, he became a Justice of the Court of King's Bench in 1825. His health even at that time was undermined and he was liable to give way under any undue strain.

It became the duty of Mr. Justice Sherwood to preside at York in 1828 at some of those semi-political trials which convulsed the Province and its little capital, and which were symptomatic of a deep-seated and far-reaching discontent with the Government and its officials, the best known exponent of this discontent being William Lyon Mackenzie. In 1826 some young men of the official class showed their resentment against Mackenzie by raiding his printing office and throwing his type into the Bay: he sued for the trespass and was given damages many times greater than his real loss; then Mackenzie began making personal attacks on Sheriff Jarvis, calling him a murderer—basing the charge upon his having killed young Ridout in a duel some years before. Jarvis published statements of those present to show that the duel had been perfectly fair on his part: then Francis Collins an enthusiastic Radical Irishman, who claimed descent from the old Irish Kings, began making similar attacks in his newspaper the *Canadian Freeman* on Henry John Boulton, the Solicitor General, who had been Jarvis' second in the duel; the Solicitor General called upon the Attorney General, John Beverley Robinson, to prefer a Bill for Criminal Libel against Collins which he did; the Grand Jury found a True Bill whereupon Collins attacked them also: they found a True Bill for that libel also: Collins was to be arraigned on the two Bills but he asked an enlargement which Mr. Justice Sherwood granted; afterwards there was apparently a misunderstanding—Robinson not acceding to Collins' request for an adjournment of his trial, Collins was convicted; he then published an article reflecting on Robinson's "native malignancy" and was again indicted for Criminal Libel. This trial also was before Mr. Justice



Sherwood; his health always poor was at the time very bad; the mosquitoes had tortured him and he was suffering from indisposition and great debility occasioned by a severe attack of the "fever of the country." After having charged the jury he became so ill that he was obliged to retire from the Bench; before doing so he stated to Collins and his counsel that Mr. Justice Hagerman would receive the verdict if they assented; this they did and Mr. Justice Hagerman took his place. The Jury brought in a verdict of "Guilty of a libel on the Attorney General"—the clerk entered a verdict of "Guilty" on the Indictment, but Dr. Rolph, Counsel for Collins, objected and Mr. Justice Hagerman then told the Jury that if they found the defendant guilty of any part of the Indictment, they should return a general verdict of "Guilty"—which they did.

It is probable that the more experienced Sherwood would have acted differently and in such a way as not to be open to objection. Much complaint was made against Hagerman's direction and more against Sherwood's very heavy sentence of a fine of £50, imprisonment for one year and to find sureties for good behaviour for three years.

The sentence was approved by Sir Peregrine Maitland and his Executive Council; but the House of Assembly took a different view. Collins was sent to jail where he complained of the Sheriff, Mr. Jarvis, not supplying him with bread, the Sheriff contending that this was an indulgence extended to indigent persons only and not a legal right; as a matter of fact, Collins had given his allowance of bread to the wife of an absconded jailer who had to support herself and her nine children. Collins did succeed in forcing the Sheriff to supply him with wood but there is no record of success in his claim for free bread.

The citizens of York and others petitioned for his release, but unsuccessfully; at length, the Lieutenant Governor asked for instructions from the Home Authorities, the Law Officers decided that the trial had been conducted in accordance with law but thought the sentence too severe, recommending its reduction by one half, and after ten months imprisonment the editor was released without bail.

The examples given may perhaps suffice to indicate the evil effect of the mosquito in this Province in early days—but who can estimate the toll of misery, disease and death taken by the tiny pest? The use of quinine has much mitigated the trouble for many years, but it is by no means got rid of. In the country to-day we see the fretful babe, with its swollen face writhing in torture from the irritation of the poisonous bites, the hard-working mother deprived of needed rest and sleep, the toiler of the field affecting to despise but in reality dreading the plague which saps his strength and dissipates his energy—the list is unending. In simple self-defence "the mosquito must go."











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